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No. _____

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In The

Supreme Court of the United States

October Term, 1991

CITY OF NEWPORT BEACH, a California City,

Petitioner,

v.

TIMOTHY HAMMER,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did *Graham v. Connor* overrule the *Schmerber v. California* test for determining the constitutionality of the extraction of a blood sample from a nonconsenting drunk driving suspect?

2. Should *Graham v. Connor* be applied retroactively to nonconsensual extractions of blood from suspected drunk drivers, and, if so, can such retroactive application be used to render a formerly constitutional city policy unconstitutional for purposes of imposing § 1983 liability on the city?

LIST OF PARTIES

The parties to the proceedings below were Petitioner City of Newport Beach, defendant below, and Respondent Timothy Hammer, plaintiff below. Charles Gross, former Chief of Police of the City of Newport Beach; Armando Zatarain, police officer of the City of Newport Beach; Hoag Memorial Hospital, located in the City of Newport Beach; and Linda De La Pena, lab technician at Hoag Memorial Hospital, also were defendants below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner City of Newport Beach respectfully prays that a writ or certiorari issue to review the decision of the Ninth Circuit Court of Appeals, *en banc*, filed May 13, 1991.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, *en banc*, is reported at 932 F.2d 842 (9th Cir. 1991), and appears as Appendix A; the opinion of the Ninth Circuit

Court of Appeals, three judge panel, is reported at 884 F.2d 1200 (9th Cir. 1989), and appears as Appendix B.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, respondent Timothy Hammer brought this suit in the Central District of California on September 23, 1985. The jurisdiction of this Court to review the decision of the Ninth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

California Vehicle Code § 13353, in effect in 1985, appears in Appendix C.

STATEMENT OF THE CASE

In June, 1985, Respondent Timothy Hammer, was arrested upon probable cause for driving under the influence of alcohol, after failing a series of field sobriety tests administered by Armando Zatarain, a police officer employed by Petitioner City of Newport Beach, California.

After applying handcuffs, Zatarain told Hammer that he would be required to take one of three chemical tests (blood, breath, or urine) to determine his blood alcohol level. Hammer replied that he refused to take any of the tests because he thought "there was a good possibility" that a chemical test would indicate that he was intoxicated. Hammer later explained that he refused because he doesn't like needles. Hammer also testified that he

believed his driver's license would be suspended for six months if he refused to submit to all three tests.[1]

Zatarain transported Hammer to the emergency room of a Newport Beach Hospital, Hoag Memorial, to obtain a blood sample. Upon arrival, Zatarain handcuffed Hammer by his right wrist to a plastic chair. Approximately five minutes later, Zatarain again asked Hammer whether he would submit to a blood test; Hammer again verbally refused. At that point, Zatarain told a Hoag Hospital laboratory technologist, Linda De La Pena, to withdraw the blood sample despite Hammer's objections. Although Zatarain denied ever having touched Hammer from the time he was first seated in the chair in the emergency room until the technician completed the blood withdrawal, Hammer testified that the officer grabbed his shoulders from behind and held him down in the chair while the technologist began to swab his left forearm with iodine. Hammer "jumped" when De La Pena attempted to insert the needle in his arm. At that point he and Zatarain, who continued trying to restrain Hammer as Hammer tried to "wrestle away" from the needle, both went over sideways onto the floor along with the chair to which Hammer was still handcuffed. Hammer testified he twisted his back as he hit the floor.

After picking Hammer up off the floor, Zatarain told Hammer that he was going to take the blood sample "the easy way or the hard way." Zatarain then went into the hallway, called in two other police officers to assist him

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[1] Hammer had been arrested previously on a DUI charge in 1980 and had some familiarity with California drunk driving laws and penalties.

and the technologist in administering the blood test, and threatened that they would throw Hammer to the floor and pin him down to complete the test if necessary. Hammer testified that at that point he said he would consent to a breath test "if that's what it's going to come to," but that Zatarain insisted upon the blood test and once again held Hammer down in the chair while the technologist took the blood sample as the officers watched.[2]

On September 23, 1985, Hammer filed a section 1983 action seeking compensatory damages from Zatarain, the City, Chief of Police Charles Gross, Hoag Memorial Hospital and De La Pena and punitive damages from the individual defendants. A jury awarded Hammer damages against Zatarain, Gross and the City.

A three judge panel of the Ninth Circuit Court of Appeals unanimously held, under this Court's decisions in *Schmerber v. California*, 384 U.S. 757 (1966), *Winston v. Lee*, 470 U.S. 753 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989)[3], that the use of force by a police officer which amounted to nothing more than the application of physical restraint required to conduct a blood test on a drunk driving suspect in a safe and efficient manner did not violate the Fourth Amendment or give rise to a 42 U.S.C.

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[2] Hammer entered a plea of no contest to the criminal DUI charge in this case; he was sentenced to attend three alcohol rehabilitation classes in the "3-D Program."

[3] The City strongly objected to the application of *Graham v. Connor* to this case. *Hammer v. Gross*, 884 F.2d 1200, 1203-1204 (1986).

§ 1983 claim against the City, Chief Gross or Officer Zatarain. *Hammer v. Gross*, 884 F.2d 1200 (9th Cir. 1989).

Upon Hammer's petition, the Ninth Circuit, in a 6-5 *en banc* decision, in which only a plurality concurred in Sections III and IV, determined that Chief Gross and Officer Zatarain were entitled to good faith immunity because the force used by Officer Zatarain in obtaining the blood sample from Hammer was "well below the level that shocks the conscience," and Chief Gross and Officer Zatarain could not be required to have anticipated the Fourth Amendment "reasonableness" standard subsequently announced in *Graham v. Connor*, 490 U.S. 389 (1989). *Hammer v. Gross*, 932 F.2d 942, 850 (9th Cir. 1989).

In reinstating the jury's verdict against the City for compensatory damages, the majority cited *Owen v. City of Independence*, 445 U.S. 622, 635-57 (1980), apparently holding constitutional injury was caused by a City policy which was constitutional in 1985, but was rendered unconstitutional by the retroactive application of *Graham*. *Id.*

The 5-judge *en banc* dissent agreed with the three-judge panel and opined that *Schmerber* and *Graham* permitted Officer Zatarain to use some physical force in order to successfully extract a blood sample, that Officer Zatarain used only the force which was necessary under the circumstances, and that there was no evidence from which a reasonable jury could conclude that Officer Zatarain had used excessive force. *Hammer v. Gross*, 932 F.2d at 854-855.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE MAJORITY THAT THE AMOUNT OF FORCE USED IN THIS CASE TO OBTAIN A BLOOD SAMPLE FROM A DRUNK DRIVING SUSPECT GIVES RISE TO CONSTITUTIONAL INJURY IS CONTRARY TO APPLICABLE DECISIONS OF THIS COURT AND OF THE CALIFORNIA APPELLATE COURTS.

A. UNDER THE DECISIONS OF THIS COURT AND THE CALIFORNIA APPELLATE COURTS, THE FORCE USED IN THIS CASE TO TAKE A BLOOD SAMPLE FROM A DRUNK DRIVING SUSPECT WAS CONSTITUTIONAL.

Since the Court's 1966 decision in *Schmerber,* on every occasion this Court has had an opportunity to revisit *Schmerber,* it has reiterated that the State's interest in deterring drunk driving outweighs the *de minimis* privacy interest of a drunk driving suspect.

The Supreme Court has "repeatedly lamented the tragedy" of drunk driving. *South Dakota v. Neville,* 459 U.S. 553, 558 (1983). "No one can seriously dispute the magnitude of the drunken driving problem or the states' interest in eradicating it. Media reports of alcohol-related deaths and mutilation on the nation's roads are legion." *Michigan State Police v. Sitz,* ___ U.S. ___, 110 S.Ct. 2481, 2485, 110 L.Ed.2d 412 (1990). In light of its concern about drunk driving, this Court has upheld: (1) the forcible extraction of blood over the defendant's objection, *Schmerber,* 384 U.S. 757; (2) blood tests and breath tests for employees involved in train accidents as required by federal regulations, *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602 (1989); (3) sobriety check points set

upon the roads to catch drunk drivers, *Sitz*, 110 S.Ct. 2481; and (4) admission of a defendant's refusal to take a breathalyzer test as evidence in a DUI trial, *Neville*, 459 U.S. 533.

In contrast to the grave importance of the state's interest in obtaining a blood sample, the risk to the privacy interest of the drunk driver has been determined by this Court to be minimal. In a recent case upholding blood tests for railway employees, this Court said:

> "Our decision in *Schmerber v California*, 382 US 757, 16 L Ed 2d 908, 86 S Ct 1826 (1966), indicates that the same is true of the blood test required by the FRA regulations. In that case, we held that a State could direct that a blood sample be withdrawn from a motorist suspected of driving while intoxicated, despite his refusal to consent to the intrusion. We noted that the test was performed in a reasonable manner, as the motorist's 'blood was taken by a physician in a hospital environment according to accepted medical practices.' Id., at 771, 16 L Ed 2d 908, 86 S Ct 1826. We said also that the intrusion occasioned by a blood test is not significant, since such 'tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.' Ibid. *Schmerber* thus confirmed 'society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity.' *Winston v Lee*, 470 US, at 762, 84 L Ed 2d 662, 105 S Ct 1611. *See also South Dakota v Neville*, 459 US 553, 563, 74 L Ed 2d 748, 103 S Ct 916 (1983) ('The simple blood-alcohol test is . . . safe, painless, and commonplace'); *Briethaupt v Abram*, 352 US 432,

> 436, 1 L Ed 2d 448, 77 S Ct 408 (1957) ('The blood test procedure has become routine in our everyday life')." *Skinner*, 489 U.S. at 625.

The California state court decisions on the use of force in the *Schmerber* context parallel this Court's decisions. In *Hernandez v. Department of Motor Vehicles*, 30 Cal.3d 70, 77, 177 Cal.Rptr. 566, 634 P.2d 917 (1981), the California Supreme Court said:

> "Prior to the enactment of [California's implied consent law, Vehicle Code § 13353], both this court and the United States Supreme Court had explicitly held that when a person has been arrested for drunk driving the police, utilizing the appropriate medical procedures, may *forcibly* remove a blood sample from the driver without his consent." (Court's emphasis.)

In *People v. Ryan*, 116 Cal.App.3d 168, 183, 171 Cal.Rptr. 854 (1981), the court rejected plaintiff's argument that the taking of a nonconsensual blood sample violated his due process rights:

> "All that has been shown was that appellant was restrained by five police officers while a technician removed the blood sample from his left arm. At the same time there is no evidence whatsoever that the police used more force than necessary to overcome appellant's resistance or introduced any wantonness, violence or beatings. As our Supreme Court repeatedly emphasized, the taking of defendant's blood for an alcohol test in a medically approved manner did not constitute brutality or shock the conscience even if it takes place against the will of the defendant . . . "

See also *Carleton v. Superior Court*, 170 Cal.App.3d 1182, 1191, 216 Cal.Rptr. 89 (1985) ("Carleton's self-induced

brief physical restraint before and during the withdrawal of a blood sample is not conscience shocking.")

The majority in this case reached its conclusion that the facts supported a finding of excessive force by reversing the weight to be given the two *Schmerber* factors – the government's interest in deterring drunk drivers and the privacy interest of the drunk driver. Instead of assigning weight to the extraction of Hammer's blood consistent with this Court's characterization of the blood extraction procedure as a "not significant" intrusion, a "commonplace" test, which is "safe", "painless" and "routine", the *Hammer* majority focused solely on " 'the integrity of an individual's person [as] a cherished value of our society' ". *Hammer v. Gross*, 932 F.2d at 846. And, instead of according the weight due the government's strong interest in stopping, or at least controlling, the highway slaughter caused by drunk drivers, the majority focused on "the degree of the authorities' need for the blood sample" *Id.*

Not only does this opinion effectively overrule a 25-year precedent of this Court, it leaves police officers, police chiefs, city councils and cities everywhere, in a quandary. How much of a police officer's valuable time must be spent discerning when a drunk driver's "no" means "yes"? As discussed below, the California appellate courts have addressed this issue many times and have concluded in every instance that "no" means "no," not "maybe," or "yes, later."

B. CALIFORNIA APPELLATE DECISIONS UNIFORMLY HOLD THAT A DRUNK DRIVING SUSPECT HAS A SINGLE OPPORTUNITY TO CONSENT TO A SOBRIETY TEST, AND IF HE REFUSES A POLICE OFFICER MAY OBTAIN A BLOOD SAMPLE FROM THE SUSPECT USING THE FORCE NECESSARY TO DO SO.

Hammer's eleventh-hour concession to take a breathalyzer test is not the "reasonable request to undergo a different form of testing" which this Court in *Schmerber* said might present "a different case". 384 U.S. at 760 n. 4. At the time the Hammer incident occurred, a long and consistent line of California case law interpreting California Vehicle Code § 13353, California's implied consent law, existed holding that a drunk driving suspect was and is entitled to a single opportunity to consent to a particular form of sobriety test.

> "Once a suspect refuses to take one of the three tests, blood, urine, or breath, there is no requirement that the officers thereafter give him a test when he decides he is ready." *Zidell v. Bright*, 264 Cal.App.2d 867, 71 Cal.Rptr. 111 (1968).

See also *Skinner v. Sillas*, 58 Cal.App.3d 591, 598, 130 Cal.Rptr. 91 (1976) (same); and see *Maxsted v. Department of Motor Vehicles*, 14 Cal.App.3d 982, 985, 92 Cal.Rptr. 579 (1971) (three refusals to take a chemical test amount to a refusal to submit to one of the required chemical tests).

The case decided closest in time to the Hammer incident was particularly emphatic in this regard. In *Dunlap v. Department of Motor Vehicles*, 156 Cal.App.3d 279, 283, 202 Cal.Rptr. 729 (1984), the appellate court reversed

the trial court's decision that a police officer was required to "reoffer" a sobriety test once refused:

> "There is no provision in Vehicle Code § 13353 requiring an arresting officer to provide extra admonitions or opportunities to complete any chemical testing once the original three tests have been refused. To the contrary, the law of implied consent mandates that an arrestee is required to submit to and complete one of the three tests upon their *first* having been offered to him by an arresting officer." (Court's emphasis.)

The California state courts, like this Court (see, e.g. *Skinner v. Railway Executives Assn.*, 489 U.S. at 623 ("[A]lcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible")), have recognized consistently the importance of performing a sobriety test in a timely manner. For example, in *Skinner v. Sillas*, 58 Cal.App.3d at 598, 599, the court said:

> "It is a matter of common knowledge that the intoxicating effect of alcohol diminishes with the passage of time. In a matter of a few hours an intoxicated person may 'sober up'. The efficacy of a blood test depends upon its being made as soon as possible after the time of the offense. To be of any probative value the test must be 'near' to the offense in point of time. If it is not taken promptly after the arrest, it proves nothing."

See also, *McConville v. Alexis*, 97 Cal.App.3d 593, 602, 159 Cal.Rptr. 49 (1979) ("Appellate courts which have touched upon the subject, however, have made clear that

time is of the essence when it comes to the taking of one of the mandated tests".)

The courts have been uniformly unsympathetic to the drunk driver's attempts to escape or delay the test. See *Buchanan v. Department of Motor Vehicles*, 100 Cal.App.3d 293, 160 Cal.Rptr. 557 (1979) (an arrestee does not have the right to specify when the test he has chosen will be administered because the efficacy of a blood test depends on its being made as soon as possible after the time of the offense); *Cole v. Department of Motor Vehicles*, 139 Cal.App.3d 870, 875, 189 Cal.Rptr. 249 (1983) ("Inherent in the objective of obtaining the 'best' evidence of an individual's blood alcohol level is the need that the test be completed in a timely fashion. The individual may not, when asked, refuse the test and then at his leisure later 'complete' a test in his own time.")

A further important reason for not allowing the whims of a suspect to dictate what happens after he is stopped on suspicion of drunk driving also has been addressed extensively by the California courts. In *Noli v. Department of Motor Vehicles*, 125 Cal.App.3d 446, 450, 178 Cal.Rptr. 56 (1981), the Court held that once a suspect chooses a urine test but fails to complete it, he is not entitled to take a breath or blood test which he had earlier refused to take, when it would require transporting him back to the medical center.

> "To hold otherwise would be to exalt form over substance in the interpretation of the statute and make the arresting officers subservient to the caprice of an inebriated and uncooperative arrestee. The officers had more important thinks to do than play games with appellant in his condition. What it boils down to is that one who

> is lawfully under arrest for drunk driving should not be able to frustrate the procedure contemplated by section 13353 and defeat its purpose by being combative and uncooperative with the arresting officers."

See also *Morphew v. Department of Motor Vehicles*, 137 Cal.App.3d 738, 744, 188 Cal.Rptr. 126 (1982) ("The officer directs the proceedings under § 13353, and the inebriated driver, by obstreperous behavior, may subjugate neither the arresting officer nor the statute to his whims."); *Morgan v. Department of Motor Vehicles*, 148 Cal.App.3d 165, 170, 195 Cal.Rptr. 707 (1983) ("The law enforcement officers of this state have more important things to do than to engage in semantic gamesmanship with those arrested for driving under the influence of alcohol."); and see *Carleton v. Superior Court*, 170 Cal.App.3d at 1191 ("Absent a clear legislative mandate giving a defendant absolute control of whether a blood alcohol test may be obtained, the lack of such evidence should not turn on the degree of a defendant's cooperation with a premium given to the more obstreperous drunk driver who is more successful in forcibly resisting the withdrawal of a blood sample.").

The majority in this case held the police officers and the City to a new constitutional standard – a sliding scale on which a police officer's conduct must become *more* reasonable as that of the drunk driver's becomes *less* so, a standard which is impossibly vague and, given the well-documented vicissitudes of a drunk driver's state of mind, impossible to meet. Under the majority's opinion, when any degree of physical resistance is present, all parties are left to guess the outcome in any given case. The moral of this case seems to be that if a drunk resists

enough, his chances of 'beating the rap' increase proportionately with his resistance. The effect of this case, as predicted by the *Hammer* dissent, will be the drunk driver purposely escalating resistance in order to later assert inappropriate force on the part of the police.

2. WHETHER A CITY CAN BE HELD LIABLE UNDER § 1983 FOR A POLICY WHICH COMPLIED WITH THE CONSTITUTIONAL STANDARD IN *SCHMERBER* AT THE TIME THE ALLEGED CONSTITUTIONAL VIOLATION OCCURRED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

At the time the alleged constitutional violation occurred and the jury reached a verdict in this case, the standard used to measure the amount of force which could be used to obtain a blood sample without violating the Constitution was the "shock the conscience" due process standard set forth in *Schmerber.*

While the appeal in this case was pending, this Court decided *Graham v. Connor,* 490 U.S. 386 (1989), holding that "the constitutional test to measure force used in connection with seizure of a person arises under the Fourth Amendment and whether the police officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Relying on its prior decision in *Reed v. Hoy,* 909 F.2d 324 (9th Cir. 1985), the Court of Appeals held, without discussion, that the *Graham* standard was applicable to this case. (*Hammer v. Gross,* 932 F.2d at 846.) By applying *Graham* retroactively, the Ninth Circuit violated the rule

of this Court set forth in *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484 (1989):

> "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

The *Schmerber* test has been the law governing nonconsensual blood extractions from truck driving suspects for more than two decades. If *Graham* is meant to overrule *Schmerber*, this Court, not the Ninth Circuit, should do it.

When viewed in light of the factors in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), retroactive application of *Graham* is not justified. Under *Chevron*, a court must assess: 1) whether the new decision "establish[ed] a new principle of law . . . by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; 2) "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further retard its operation"; and 3) the respective inequities of retroactive or nonretroactive application. *Id.* at 106-107.

If *Graham* applies in the *Schmerber* context, it has overruled clear past precedent, changing the "shock the conscience" due process test to one of objective reasonableness under the Fourth Amendment. (See *Hammer v. Gross*, 932 F.2d at 845.) The "purpose" of *Graham* was to apply the Fourth Amendment to excessive force claims, not to provide money damages. Finally, retroactive application of *Graham* in this context would produce substantial inequitable results by imposing liability on

municipalities for law enforcement practices that were legitimate at the time they were undertaken. See *Griffin v. Illinois*, 351 U.S. 12, 26 (1956) ([The Court] should not indulge in the fiction that the law now announced has always been the law . . . "), and see *Pembaur v. Cincinnati*, 475 U.S. 469, 494 (1986) (Powell, J. dissenting) ("Civil liability should not attach unless there was notice that a constitutional right was at risk.").

In *American Trucking Assns. v. Smith*, ___ U.S. ___, 110 S.Ct. 359, 110 L.Ed.2d 148, 160 (1990), the Court rejected an argument, purportedly based on *Owen v. City of Independence*, 445 U.S. 622, that the equities always favor applying decisions retroactively when those decisions would burden only a governmental entity. The Court said:

> "In *Owen*, we discerned that according municipalities a special immunity from liability for violations of constitutional rights would not best serve the goals of § 1983, even if those rights had not been clearly established when the violation occurred. Such a determination merely makes municipalities, like private individuals, responsible for anticipating developments in the law. We noted that such liability would motivate each of the city's elected officials to 'consider whether his decision comports with constitutional mandates and . . . weigh the risk that a violation might result in an award of damages from the public treasury. *Id.*, at 656, 63 L.Ed.2d 673, 100 S.Ct. 1398. *This analysis does not apply when a decision clearly breaks with precedent, a type of departure which, by definition, public officials could not anticipate nor have any responsibility to anticipate.*" (Emphasis added.)

Civil liability should not attach to cities unless there has been notice that a constitutional right was at risk. Conforming police conduct to the *Schmerber* standard was more than merely exercising good faith; it was acting in reliance on what appeared over many years to have been valid and proper, Court-sanctioned, police conduct and policy. See *Carter v. City of Chattanooga*, 850 F.2d 1119, 1131 (6th Cir. 1988).

The primary reason for imposing § 1983 liability on a municipality is deterrence. *Owen*, 445 U.S. at 652. Application of *Graham* to causes of action arising before 1989 will have no appreciable deterrent effect, but will rather serve as a blow to the morale of police officers who, without a reasonable basis for questioning the constitutionality of existing law, were somehow expected to predict subsequent changes in the law. Hammer understandably has a strong interest in compensation. However, retroactive application of the *Graham* standard would penalize law enforcement practices that were constitutionally sound at the time they were undertaken. *Rodriguez v. City of Passaic*, 730 F.Supp. 1314, 1325-1326 (D.N.J.), aff'd 914 F.2d 244 (3rd Cir. 1990).

Because of the importance of this issue to thousands of municipalities, this Court should decide whether an undeniably constitutional municipal policy can be rendered unconstitutional by the retroactive application of new law which breaks with clear past precedent.

CONCLUSION

This case vividly demonstrates the utter confusion facing the courts, public entities, their police chiefs and police officers when confronted with a recalcitrant drunk driver who refuses to submit to a sobriety test. A decision of this Court is desperately needed so that police officers, who encounter drunk drivers thousands of times a day, have coherent guidelines on which to act.

Respectfully submitted,

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Dated: August 12, 1991

APPENDIX A

Timothy HAMMER, Plaintiff-Appellee,

v.

Charles GROSS; Armando Zatarain; Newport Beach City, Defendants-Appellants,

and

Linda Delapena, et al., Defendant.

Timothy HAMMER, Plaintiff-Appellant,

v.

Charles GROSS; Armando Zatarain; Newport Beach City, Linda Delapena et al., Defendants-Appellees.

Nos. 87-6682, 88-5638.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 22, 1990.

Decided May 13, 1991.

Appeal from the United States District Court for the Central District of California.

OPINION

Before GOODWIN, BROWNING, SCHROEDER, FARRIS, NELSON, CANBY, REINHARDT, BEEZER, KOZINSKI, THOMPSON and FERNANDEZ, Circuit Judges.

CANBY, Circuit Judge, announcing the judgment of the Court and an opinion of which all but Section III and IV is that of the Court. Section III of Judge Canby's

opinion is joined by Judges Schroeder, Farris, and Reinhardt; Section IV is joined by Judges Schroeder, Farris, D.W. Nelson and Kozinski:

Appellant Timothy Hammer brought this action under 42 U.S.C. § 1983, alleging that his constitutional rights were violated when a police officer, having arrested Hammer for drunken driving, employed force to cause Hammer to submit to extraction of a blood sample. A jury awarded Hammer damages against Armando Zatarain, the officer who employed the force, Charles Gross, then chief of police, and Newport Beach City, the employer of Zatarain and Gross. On appeal, a panel of this court reversed, holding that the trial judge erred in denying the defendants' motions for directed verdict and judgment notwithstanding the verdict. *Hammer v. Gross*, 884 F.2d 1200 (9th Cir. 1989). Upon Hammer's petition, the full court then ordered this rehearing en banc.

I

The facts, viewed in the light most favorable to Hammer, were well-stated in the previous panel's opinion; for convenience, we repeat most of them here. In June 1985, Hammer was arrested upon probable cause for driving under the influence of alcohol, after failing a series of field sobriety tests administered by defendant Zatarain. After applying handcuffs, Zatarain told Hammer that he would be required to take one of three chemical tests (blood, breath or urine) to determine his blood alcohol level. Hammer replied that he refused to take any of the tests. He later testified that he did so because he thought

"there was a good possibility" that a chemical test would indicate that he was intoxicated.

Zatarain transported Hammer to the emergency room of a Newport Beach hospital to obtain a blood sample. Upon arrival, Zatarain handcuffed Hammer by his right wrist to a hard plastic chair. Approximately five minutes later, Zatarain again asked Hammer whether Hammer would submit to a blood test; Hammer again verbally refused. At that point, Zatarain told a hospital laboratory technologist to withdraw the blood sample despite Hammer's objections. Although Zatarain denied ever having touched Hammer from the time he was first seated in the chair until the technologist completed the blood withdrawal, Hammer testified that the officer grabbed his shoulders from behind and held him down in the chair while the technologist began to swab his left forearm with iodine. Hammer, who later testified that he doesn't like needles, "jumped" when the technologist attempted to insert the needle into his arm. At that point he and Zatarain, who continued trying to restrain Hammer as Hammer tried to "wrestle away" from the needle, both went over sideways onto the floor along with the chair to which Hammer was still handcuffed. Hammer twisted his back as he hit the floor.

After picking Hammer up off the floor, Zatarain told Hammer that he was going to take the blood sample "the easy way or the hard way." Zatarain then went into the hallway, called in two other police officers to assist him and the technologist in administering the blood test, and threatened that they would throw Hammer to the floor and pin him down to complete the test if necessary. Hammer testified that at that point he said that he would

consent to a breath test "if that's what it's going to come to," but that Zatarain insisted upon the blood test and once again held Hammer down in the chair while the technologist took the blood sample as the officers watched.

II

The first question before us on rehearing is whether the above facts can sustain the jury's verdict consistently with applicable law. Additional questions are whether the trial court properly instructed the jury in light of that law and, if not, whether defendants preserved the issue for appeal.

The foundation case is *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). In *Schmerber*, the Supreme Court held that it did not violate the Fourth Amendment for police, upon probable cause but without a warrant, to cause a blood sample to be taken from an arrested hospitalized suspect who had declined to take a breathalyzer test. Although the suspect had refused to consent to the extraction of blood, there was no suggestion of physical resistance by the suspect or use of force by the police. In determining that the extraction of blood was not an unreasonable search, the Court emphasized the routine nature of the test, and the fact that it was performed by a physician in a hospital environment. The Court noted that these factors had earlier led the Court to hold that the extraction of blood from an unconscious, hospitalized suspect after a fatal crash did not "shock the conscience" and thereby violate the due process clause of the Fourteenth Amendment. *See Breithaupt*

v. Abram, 352 U.S. 432, 435-38, 77 S.Ct. 408, 410-12, 1 L.Ed.2d 448 (1957). The Court in *Schmerber* also said, however, that

> Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused. . . . We need not decide whether such wishes would have to be respected.

Schmerber, 384 U.S. at 771, 86 S.Ct. at 1836. The Court also noted that it reached its judgment "only on the facts of the present record," and that its holding in no way indicates that the Constitution "permits more substantial intrusions, or intrusions under other conditions." *Id.* at 772, 86 S.Ct. at 1836.

As we have said, *Schmerber* involved no physical resistance and no use of force. The defendants argue, however, that the decision necessarily legitimizes the use of force to overcome resistance to a procedure that the defendants are entitled to employ. The Supreme Court could not have intended a rule, they say, that would refuse to honor a suspect's purely verbal objection but would give effect to an objection backed by physical resistance. Defendants support their argument with a footnote in *Schmerber* relating to the Court's rejection of Schmerber's Fifth Amendment argument:

> We "cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest." *Breithaupt v. Abram*, 352 U.S., at 441 [77 S.Ct. at 413] (Warren, C.J., dissenting). It would be a different case if the police initiated the violence, refused to respect a reasonable request

> to undergo a different form of testing, or responded to resistance with inappropriate force.
>
> * * *

Schmerber, 384 U.S. at 760 n. 4, 86 S.Ct. at 1830 n. 4.

We assume for purposes of decision that *Schmerber* does not preclude the use of force in some circumstances to extract a blood sample from a resistant suspect. The crucial question in this case, however, is whether a rational jury could conclude that the force used was excessive under the circumstances presented here. The defendants argue in part that the force could not have been excessive because, as plaintiff concedes, it did not rise to a level that "shocks the conscience." But to say that force must "shock the conscience" is to employ a shorthand version of a due process test that is no longer the correct one for evaluating the propriety of force used in effecting a search or seizure. Because the right in issue arises under the Fourth Amendment, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).[1] The test balances the intrusion on the

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[1] We agree with the three-judge panel that *Graham's* test applies to this search even though *Graham* did not decide "whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." *Graham*, 109 S.Ct. at 1871 n. 10. *Graham* dealt with force used in connection with a seizure of

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individual's Fourth Amendment right against the government interests at stake, *id.*, 109 S.Ct. at 1871, and the reasonableness of the search is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 1872. We have held that the *Graham* analysis is to be applied retroactively. *Reed v. Hoy*, 909 F.2d 324, 327-28 (*modifying* 891 F.2d 1421 (9th Cir. 1989)).

III

We address, then, the question whether a rational jury could find that the actions of the defendants in employing the force that they did to overcome Hammer's resistance and extract his blood were not " 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham*, 109 S.Ct. at 1872. The defendants contend that the force they employed was reasonable as a matter of law because, in addition to its not "shocking the conscience," it was no greater than that required to overcome Hammer's resistance. The test of reasonableness is not that one-dimensional, however. For example, deadly force may not constitutionally be used against a fleeing

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(Continued from previous page)

the person, and it may be questioned whether the Fourth Amendment still controls when the seizure or arrest ripens into detention. There is little question, however, that an actual search like the one before us would continue to be governed by Fourth Amendment principles. The Supreme Court left little doubt in *Graham* that, if the Fourth Amendment is the source of the right in issue, the propriety of force is to be measured by the objective Fourth Amendment test of reasonableness in the circumstances. *See Graham*, 109 S.Ct. at 1871.

non-dangerous burglary suspect, even though that is the only way that he can be apprehended. "A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985). The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of *all* the relevant circumstances.

The jury, then, was entitled to consider several factors in determining whether the force used against Hammer was unreasonable. One is the fact that Hammer was actively resisting the extraction of his blood. *See Graham*, 109 S.Ct. at 1872. Others include "the severity of the crime at issue" and whether Hammer posed "an immediate threat to the safety of the officers or others." *Id.* It is also appropriate to consider whether the police "refused to respect a reasonable request to undergo a different form of testing." *Schmerber*, 384 U.S. at 760 n. 4, 86 S.Ct. at 1830 n. 4. Finally, in weighing the "countervailing governmental interests at stake," *Graham*, 109 S.Ct. at 1871, some attention must be given to the degree of the authorities' need for the blood sample.

Many of these factors weigh in favor of Hammer. It is true that he was forcibly resisting the test, which he had no right to do. On the other hand, his offense, while certainly not to be taken lightly, was a misdemeanor. (In *Schmerber*, the offense was potentially a felony, because a person had been injured. *Schmerber*, 384 U.S. at 768-69 n. 12, 86 S.Ct. at 1834-35 n. 12. In *Breithaupt*, three persons had been killed. *Breithaupt*, 352 U.S. at 433, 77 S.Ct. at 409.) Hammer certainly posed no threat to the safety of

the officers or others. Moreover, after some force had been applied but before the blood was actually extracted, Hammer had agreed to submit to a breathalyzer test. Consent to a breathalyzer test may very well have reduced to insignificance the defendants' need to extract Hammer's blood. The defendants argue that Hammer's belated consent to take a breathalyzer test was not given in good faith, but was a mere ploy to create further delay. That is possible, but we cannot say that bad faith was established as a matter of law. The jury could have concluded that the consent was genuine, rendering further use of force unreasonable.

In light of all these considerations, and of the fact that "the integrity of an individual's person is a cherished value of our society," *Schmerber*, 384 U.S. at 772, 86 S.Ct. at 1836, we conclude that the question of the reasonableness of force applied by the defendants in the circumstances of this case was properly one for the jury. The district court did not err, therefore, in determining that the defendants were not entitled to a directed verdict or to judgment notwithstanding the verdict.

IV

The defendants argue that the verdict still should not stand because the jury was misled into believing that *no* force could ever properly be employed to extract a blood sample. Analysis of this issue is complicated somewhat by two factors. The first is that the jury was instructed to apply the due process test of unreasonable force that was rejected in *Graham*. That test evaluates claims of excessive

force in light of four factors,[2] and was set forth in the jury instructions in this case as follows:

> Now plaintiff may recover for excessive use of force under section 1983 of the civil rights laws if the degree of force used was unreasonable under the circumstances or if the force was used for an improper purpose. The following factors are relevant to determining whether the use of force was reasonable or properly motivated:
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> A court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

It was the fourth factor, with its subjective, motivational component, that the Supreme Court found particularly objectionable in *Graham*, 109 S.Ct. at 1872-73. It arguably could have permitted the jury in this case to find that force had been applied to Hammer with an improper motive, rendering the use of force impermissible.

The defendants are in no position to complain about the instruction, however, because they did not object to it. Rule 51 is quite explicit that "[n]o party may assign as error the giving or the failure to give an instruction

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[2] The test was first formulated in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973), and was subsequently adopted by this court. *E.g., Rinker v. County of Napa*, 831 F.2d 829, 831-32 (9th Cir.1987).

unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P. 51. This court has enjoyed a reputation as the strictest enforcer of Rule 51; we have declared that there is no "plain error" exception in civil cases in this circuit. *Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 572 (9th Cir.1960), *cert. denied*, 365 U.S. 816, 81 S.Ct. 697, 5 L.Ed.2d 694 (1961); *Brett v. Hotel Employees and Bartenders Union, Local 879*, 828 F.2d 1409, 1414 n. 7 (9th Cir.1987); *Herrington v. Sonoma County*, 834 F.2d 1488, 1500 n. 12 *modified on other grounds*, 857 F.2d 567 (9th Cir.1988), *cert. denied*, 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989); *see Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 213 (9th Cir.1988); *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 209 n. 8 (9th Cir.1990) (Kozinski, J., dissenting). *See also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558, at 674 (1971) ("the Ninth Circuit stands alone in reading Civil Rule 51 literally and denying that there is any power to reverse for plain error in an unobjected-to instruction in a civil case"). We have said that the sole permissible deviation from the strictures of Rule 51 is that, where the trial court is aware of the party's concerns with an instruction and further objection would be unavailing, we will not require a formal objection. *Brett*, 828 F.2d at 1414 n. 7; *see Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1373 (9th Cir.1979). The defendants in this case certainly did not make known any concern with the court's due process excessive-force instruction, or with its subjective element.

We would end our discussion of the district court's instruction here, except for language in two of our recent

decisions that seems to cast doubt on our consistent tradition of strict enforcement of Rule 51. In *Reed v. Hoy*, we dealt with a situation parallel to the one present here; the district court had not anticipated *Graham* and had given an unreasonable-force instruction based on *Johnson v. Glick*. After deciding that *Graham* was to be applied retroactively, we held that "it was plain error" for the district court to give the *Johnson v. Glick* instruction. We referred approvingly to *Miller v. Lovett*, 879 F.2d 1066, 1070 (2d Cir.1989), in which the Second Circuit had held such an instruction to be plain error and had reversed without regard to whether proper objections had been made as prescribed by Rule 51. We also noted in *Reed*, however, that the appellant had in fact objected to the instruction given and had offered an appropriate one of his own. *Reed*, 909 F.2d at 330 n. 4 (*modifying* 891 F.2d at 1421). Subsequently, we were presented with a like case where no objection had been made. We held that it was "plain error" to give the *Johnson v. Glick* instruction, and that we would have been compelled to reverse for plain error if we had not been able, as we were, to determine that the force used was reasonable as a matter of law. *Eberle v. City of Anaheim*, 901 F.2d 814, 820 (9th Cir.1990).

Despite their language, we do not accept *Reed* and *Eberle* as establishing a plain error exception to Rule 51 in this circuit. In neither case was plain error employed as a ground of reversal, nor was the doctrine essential to the decision. *See Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir.1986) (contrary dictum does not erode precedent foreclosing plain error review of instruction to which objection not taken). Perhaps for that reason, neither *Reed* nor *Eberle* dealt with our consistent line of cases

rejecting plain error as an exception to Rule 51. We find no justification for abandoning our tradition today. A plain error exception to Rule 51 lacks the authorization that Criminal Rule 52(b) confers in criminal cases.[3] Our established position has spared us "the burden of having to review afterthought claims of errors in the instructions that counsel attempt to bring forward under the banner of plain error." Wright & Miller, supra, § 2558 at 674-75. We adhere to it.

Defendants are foreclosed, therefore, from objecting on appeal to the fact that the jury might have based its decision on subjective factors embodied in the court's instruction on excessive force. Defendants claim, however, that the jury was misled for other reasons as well. Their argument is lent some force by the second complicating factor in the record – the fact that Hammer himself took an insupportable position at trial. He adopted the view that, because California law provided for suspending the license of drivers who refused to take any blood-alcohol test, *see* Calif.Vehicle Code § 13353, California had in effect chosen not to permit forcible extraction of blood for purposes of pursuing criminal charges. Not only is this view contrary to California precedent, *see, e.g., Carleton v. Superior Court*, 170 Cal.App.3d 1182, 1187 n. 1, 216 Cal.Rptr. 890, 893 n. 1 (1985), it has little to recommend it as a matter of federal constitutional law. The existence of a state administrative scheme for the suspension or

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[3] Fed.R.Crim.P. 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." There is no corresponding provision in the Federal Rules of Civil Procedure.

revocation of drivers' licenses does not, ipso facto, render the state less entitled than otherwise to prosecute drunken drivers criminally, or to gather evidence for that purpose.

Hammer's misguided notion was not, however, the theory on which the case was submitted to the jury. The jury was not told that the use of force was improper; it was told that "plaintiff may recover for excessive use of force under section 1983 of the Civil Rights Laws if the degree of force used was unreasonable under the circumstances or if the force was used for an improper purpose." The jury was further instructed that, in order to prove his claim, Hammer first had to establish "that the defendants performed acts which operated to deprive the plaintiff of one or more of his federal constitutional rights as defined and explained in these instructions by using excessive force against the plaintiff during the course of his arrest." These instructions could not have left the jury with the impression that *any* force, no matter how reasonable, was impermissible regardless of the circumstances. It is true that Hammer's counsel, in argument, might have conveyed that impression, but the court on numerous occasions warned the jury that the court's instructions, not arguments of counsel, set forth the law to be applied.

It is also true that the court instructed the jury on Calif.Vehicle Code § 13353, which provides for suspension of drivers' licenses for refusal to submit to blood-alcohol testing. That instruction was given in connection with Hammer's claim of deprivation of liberty without due process, not his Fourth Amendment claim. The court stated first that "[if] the defendants acted within the

limits of their authority under state law, then the defendants could not have deprived the plaintiff of any right 'without due process of law.' " The court then said that "[t]he particular vehicle code statute or ordinance involved here reads as follows" and read section 13353. We need not decide whether this instruction could have been misleading with regard to the Fourth Amendment question of reasonable force that the defendants have made the subject of this appeal. The defendants made no objection of any kind to the instruction. They cannot now argue that it was error for the court to give it. Fed.R.Civ.P. 51.

The defendants further complain that the district court, by refusing to give certain instructions requested by the defendants, failed to give the defendants the benefit of the *Schmerber* decision in establishing the law to be applied by the jury. The requested instructions, however, were segments taken from the Court's reasoning in *Schmerber*. The trial court, within its discretion, could have concluded that, out of context, those segments would have distorted the balancing process in which the jury was to engage. For example, one instruction urged by defendants stated: "The taking of a suspect's blood for an alcohol test in a medically approved manner does not constitute brutality or shock the conscience, even if it takes place against the will of the suspect." That instruction, appropriate as reasoning in *Schmerber* where no force had been used, might in the present case have misled the jury to believe that the use of approved medical procedures was a complete defense to the charge of unreasonable force asserted by Hammer. At least the trial court, in its discretion, could so have concluded.

Another of the defendants' proposed instructions would have advised the jury that "It is well established that the government may utilize the results of chemical analysis performed upon a blood sample forcibly removed from a suspect provided that (a) the removal is done in a reasonable, medically approved manner; (b) is incident to defendant's arrest; and (c) is based upon the reasonable belief that a person is intoxicated." Certainly the district court could have rejected this instruction as misleading or confusing, because it is addressed to the question of admissibility of the blood sample in other proceedings, and not primarily to the question of reasonableness of force. The instruction also might appear to equate reasonableness of force with employment of a medical procedure. The other instructions offered by the defendants were subject to the same infirmity. The district court did not err in rejecting all of them.

V

Defendant Gross, who was chief of police at the time, and the City contend that, even if Officer Zatarain may be found to have used excessive force, there was no showing that the chief or the city sanctioned the use of such force as a policy. We disagree. Chief Gross testified that during his tenure he was responsible for formulating police policies of Newport Beach. Defendants do not here contest his capacity to establish policy for the City.[4] Chief Gross

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[4] The question whether Chief Gross could make policy for the City was submitted to the jury with no objection. Since the trial of this case, the Supreme Court has made it clear that the

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further testified that the departmental policy when a suspect refused all three blood-alcohol tests was that blood could be forcibly extracted so long as the force used did not shock the conscience. The option to extract forcibly or not was left to the officer's discretion, as was the question whether to accept a belated offer by a suspect to take a breathalyzer test. Another witness, one Bohunis, testified that some months before Hammer's arrest he had been apprehended by Officer Zatarain and, after being unable to complete a breathalyzer test, had been subjected to a blood extraction over his resistance by the very substantial forcible efforts of seven officers. In light of all the testimony, the jury could reasonably have found that Chief Gross had established for the City a policy that permitted the use of more force than was reasonable in the circumstances, in violation of Hammer's Fourth Amendment rights.

VI

Finally, defendants Zatarain and Gross contend that they were entitled to qualified immunity as a matter of law. These defendants are immune from personal liability if reasonable officers in their position, in light of clearly established law, could have believed that the actions they took were lawful. *See Anderson v. Creighton*, 483 U.S. 635,

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issue is one of state law to be decided by the court before the case is submitted to the jury. *Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 2723, 105 L.Ed.2d 598 (1989); *St. Louis v. Praprotnik*, 485 U.S. 112, 124, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988) (plurality opinion).

641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). We conclude, as a matter of law, that reasonable officers could so have believed at the time of Hammer's arrest. At that time, *Breithaupt* and *Schmerber* had been decided, permitting withdrawal of a subject's blood when the subject was, respectively, unconscious or objecting. Both cases had established that the intrusion caused by the withdrawal of blood itself was not unreasonable. *Breithaupt* had accepted the rule of *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), holding force that "shocked the conscience" to be a violation of due process.[5] That standard was not violated by defendants Zatarain and Gross, as Hammer concedes. At the time of Hammer's arrest, *Graham v. Connor* had not been decided. As we have indicated, *Graham* imposes a balancing test that can, in the circumstances of this case, result in force being found excessive even though it did not rise to the level that shocks the conscience. Reasonable officers, however, cannot be required to have anticipated the ruling in *Graham*. We conclude as a matter of law, therefore, that officers Zatarain and Gross are immune from personal liability in damages for their actions in applying or authorizing the use of force that was unreasonable in all the circumstances but well below the level that shocks the conscience.

Hammer suggested at oral argument that an officer who has used unreasonable force cannot, by definition,

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[5] Prior to date of Hammer's arrest, we had similarly held due process to be violated by force characterized as "intentional, unjustified, brutal, and offensive to human dignity." *Meredith v. Arizona*, 523 F.2d 481, 484 (9th Cir.1975).

have acted reasonably. A similar contention was rejected, however, in *Anderson*. Whether a search is "unreasonable" within the meaning of the Fourth Amendment is an entirely different question from whether an officer reasonably could have believed his actions lawful under the Fourth Amendment. *Anderson*, 483 U.S. at 643-44, 107 S.Ct. at 3040-41. To accept Hammer's contention would be to eliminate all possibility of immunity for violations of the Fourth Amendment, an unacceptable outcome. *See id.* at 643, 107 S.Ct. at 3040.

VII

Hammer correctly points out that the City is not entitled to the qualified immunity asserted by Officer Zatarain and Chief Gross. *Owen v. City of Independence*, 445 U.S. 622, 635-57, 100 S.Ct. 1398, 1407-18, 63 L.Ed.2d 673 (1980). We therefore reinstate the verdict against the City for compensatory damages of $2,500.

Hammer suggested at oral argument that the City should also be held liable for the compensatory awards[6] against Officer Zatarain and Chief Gross, amounting to $500 each, because they were sued in their official, as well as their individual, capacities. That fact is not at all clear

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[6] Hammer concedes that the City may not be held liable for the punitive damages awards of $2,000 against Officer Zatarain and $10,000 against Chief Gross. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-71, 101 S.Ct. 2748, 2755-62, 69 L.Ed.2d 616 (1981) (punitive damages may not be awarded against municipality under § 1983).

from the record.[7] What is clear, however, is that the City itself was named as a defendant and the jury was instructed that it could award compensatory damages against the City for injury attributable to a city policy. *See Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 694-95, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978). So instructed, the jury rendered a separate verdict against the City. At the same time, it entered verdicts against Officer Zatarain and Chief Gross for both compensatory and punitive damages. Under these circumstances, it is apparent that the awards against the individuals were individual, not official. Indeed, by the time of trial, Chief Gross had retired; the action nevertheless continued against him individually, and the successor chief of police was not substituted for him. *See Brandon v. Holt*, 469 U.S. 464, 470-71, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985) (clear that suit is against individual in official capacity when successor is substituted upon departure of original defendant from office).

"[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. . . . " *Monell*, 436 U.S. at 690 n. 55, 98 S.Ct. at 2035 n. 55. Here, Hammer expressly included the City as a named defendant. The verdict against the City stands on its own as compensation for the damages caused Hammer by the City's policy. That is

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[7] Neither the complaint nor the pretrial order mentions the capacity in which the individual defendants are sued. At one sidebar conference, Hammer's attorney did state that they were sued in both official and individual capacities, but the point was not further discussed.

the only cost that the public is required to bear. *See Owen*, 445 U.S. at 657, 100 S.Ct. at 1418. It is not to be supplemented by the awards against Officer Zatarain and Chief Gross, which, in context, were directed against them as individuals.

VIII

In conclusion, we vacate the decision of the three-judge panel, 884 F.2d 1200. We affirm the judgment of the district court insofar as it upholds the award of compensatory damages against the City of Newport. We reverse, on the ground of qualified immunity, the judgment against Officer Zatarain and Chief Gross for compensatory and punitive damages. The issue of attorneys' fees, raised by Hammer's appeal and not presented to us, is remanded to the three-judge panel for its consideration.

AFFIRMED IN PART; REVERSED IN PART; REMANDED TO THREE-JUDGE PANEL.

REINHARDT, Circuit Judge, concurring specially:

I fully agree with Judge Canby's excellent opinion – with one minor exception. To the extent that Section IV sets forth the proposition that the plain error exception is inapplicable in appeals involving civil jury instructions, I disagree. As Judge Canby's opinion acknowledges, the law in our circuit is unclear on this point. *Reed v. Hoy*, 909 F.2d 324, 327-28 (*modifying*, 891 F.2d 1421 (9th Cir. 1989), and *Eberle v. City of Anaheim*, 901 F.2d 814, 820 (9th Cir. 1990), suggest that we have retreated from the inflexible rule that we alone previously applied. For reasons that are not worth belaboring here, I do not believe it is

necessary for us to reach the plain error question in this case. However, if we were required to do so, I would be inclined to take the approach set forth in *Reed* and *Eberle*, relax our earlier harsh rule, and join the other circuits in adopting a more flexible and reasonable approach.

KOZINSKI, Circuit Judge, with whom Circuit Judge D.W. NELSON joins, concurring in part:

For me, this case turns on a single fact: Hammer agreed to submit to an alternative alcohol test to avoid having blood drawn from his vein, but he was nonetheless subjected to the forcible extraction of his blood. The defense offered no evidence that Hammer's consent came too late because an alternative test was unavailable or would no longer be effective. Indeed, since the blood was drawn in a hospital emergency room, one can assume the rather rudimentary equipment necessary for obtaining a urine sample was close at hand. While the record does not reveal the breathalyzer's whereabouts, the police had offered to administer that test to Hammer earlier; it's reasonable to infer that the equipment was still in their possession or nearby.[1]

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[1] My dissenting colleagues note that "evidence of intoxication is . . . evanescent" and that "delays substantially affect the accuracy of testing." Dissent at 845 n. 1. I fail to understand the relevance of these observations. The deteriorating nature of the evidence might affect the timing of the test, but it has no bearing on the type of test selected. Nothing in the record suggests that the passage of time renders one type of test less reliable than the others; nor is there any proof that administering the test Hammer eventually agreed to would have caused a material delay.

These situations are inherently difficult for everyone involved. The suspect may be confused, disoriented and, in all likelihood, terrified. If an alternative test is readily available and a suspect requests it, police officers may not arbitrarily refuse to administer it simply because the suspect did not have the presence of mind to make a decision more promptly or because he changed his mind. The standard, as always under the fourth amendment, is reasonableness. Defendants have offered no explanation for officer Zatarain's refusal to comply with Hammer's request. Based on the evidence, the jury could conclude that officer Zatarain's refusal to administer an alternative test was unreasonable.

While I reach the same result as four of my colleagues who make up the plurality, I am unable to join part III of Judge Canby's opinion because I cannot subscribe to its multifactor analysis.[2] Of the five factors Judge Canby lists, only two are relevant in this particular case. The government's need for the blood is, of course, critical: It would be senseless, cruel and unreasonable for the government to draw blood without needing it. Yet, that's what the jury could have found happened here: Because Hammer consented to a breath test, the government had no need for the blood but nonetheless obtained it forcibly. I also agree that the suspect's request for an alternative form of testing is relevant, although this is just another way of asking whether the government needed

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[2] I do, however, join the rest of the opinion, particularly its reaffirmation of our longstanding rule that there is no plain error exception to Fed.R.Civ.P. 51. Canby opinion at 847-848.

the blood. Saying the same thing twice gives it no more weight.

The remaining factors – the seriousness of the offense, whether the suspect resists and whether he poses a threat to the officers – gratuitously complicate the plurality's analysis, casting a shroud of uncertainty over a very important area of the law: how officers must handle recalcitrant drunk driving suspects.

I don't see why the seriousness of the offense is a relevant consideration. Would the police have been free to ignore Hammer's request for a breath test if only the offense had been more serious? Certainly not. No matter how serious the offense, the availability of an equally effective, consensual method of obtaining the evidence conclusively renders use of the nonconsensual method unreasonable. If the suspect requests a breath or urine test and it will do the job just as well, it must be used in lieu of a blood test – even where the suspected crime is murder in the first degree. There is, in my view, never an excuse for using a more intrusive test when a less intrusive one will do. Any other rule would invite police to harass suspects of very serious crimes by subjecting them to the most onerous test available.

Even if the seriousness of the offense were a legitimate factor, the plurality places far too much weight on the fact that drunk driving is a misdemeanor. The plurality cannot dispute that drunk drivers kill tens of thousands of innocent people – and maim hundreds of thousands more – every year. L.A. Times, Dec. 26, 1988, pt. V, at 14, col. 1 (23,632 killed and 560,000 injured by drunk drivers in 1987). Nor can it deny that the state has

a real and substantial interest in punishing and deterring drunk driving. *See Michigan Dep't of State Police v. Sitz*, ___ U.S. ___, 110 S.Ct. 2481, 2485-86, 110 L.Ed.2d 412 (1990). Yet, the opinion implies that because California classifies drunk driving as a misdemeanor, it can claim only a minimal interest in enforcing its drunk driving laws. This just isn't so. California may have chosen to classify drunk driving as a misdemeanor because drunk drivers normally can be rehabilitated, a goal that might be impaired by the harsh penalties and stigma associated with the felony label. Then again, the state might have been concerned that juries would be reluctant to subject defendants who look much like themselves to felony convictions. We can only speculate about the state's reasons. Surely, however, drunk driving is as serious a problem as many crimes that are labeled felonies, *e.g.*, stealing $400 of possessions from a corpse;[3] impersonating a bride or bridegroom;[4] or selling 1/10 of an ounce of marijuana.[5] The importance of the state's interest – to the extent it is relevant at all – must be judged by reference to reality, not labels.

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[3] Cal.Pen.Code § 642 (West 1988) makes it a felony to commit grand theft from a dead person; under Cal.Pen.Code § 487 (West Supp. 1991), grand theft is the theft of possessions worth more than $400. If those possessions happen to be avocados or crustaceans, $100 worth will do; and if it's one of the listed farm animals, its value is immaterial. *See* Cal.Pen.Code § 487 (West Supp. 1991). It follows that the nonconsensual removal of a goat from a corpse would be a felony in California.

[4] *Id.* § 528 (marrying or pretending to marry someone by falsely impersonating another is a felony).

[5] *Id.* § 11359.

The second factor considered by the plurality – whether the suspect resists – is certainly relevant in determining how much force the police may use in those many cases where the police have a legitimate need for the blood. But I don't see how it has any relevance in this case. Because the police had no need for blood, they weren't entitled to use *any* force to obtain it. Why, then, does it matter that Hammer resisted? Only if the police have a reason to draw blood need we consider the suspect's resistance, and then only in judging whether the amount of force used is reasonable.

The remaining factor – whether the individual is a threat to the officers – has no bearing at all here. The plurality strips this factor from *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989), without paying any attention to *Graham's* context. There, the Supreme Court dealt with use of force during an investigatory stop. Under those circumstances, a suspect may pose a danger to the officers or the public and that risk should be considered in determining whether the force used was reasonable. But I just can't imagine a case where the police need to administer a blood test in self-defense.

The bottom line is that officer Zatarain acted properly in every respect but one: He failed to give Hammer an alternative test when Hammer consented to it and when (it appears from the record) the alternative was readily available. The plurality's analysis calls into question other aspects of the officer's behavior, turning virtually every seizure of blood into a jury case. After all, most blood tests will be for run-of-the-mill DUIs (mere misdemeanors); and none will involve the taking of blood

to neutralize a threat to the officers. That's two out of five factors favoring the plaintiff – probably enough to preclude summary judgment – just about every time the police take blood.

By raising the specter of litigation as to virtually every blood seizure, the plurality threatens to disrupt state procedures for dealing with recalcitrant drunk driving suspects. Drunk driving is a serious problem; there is no reason to gum up the process for obtaining proof of blood alcohol content because of a solitary mistake by one officer in a single case. The plurality does just that by pulling into the balance various factors that have no bearing at all in this, or any other, drunk driving case. Because the plurality's failure to distinguish relevant factors from irrelevant ones will have serious and adverse consequences for enforcement of our drunk driving laws, I cannot join part III of the opinion. Which, of course, means that the plurality's analysis does not become the law of the circuit.

Nor can I agree with my dissenting colleagues. As I see it, the dissent places undue reliance on the "one bite" rule embodied in Cal.Veh.Code § 13353. *See* dissent at 854 ("The California courts have also wisely indicated that section 13353 grants a person a single opportunity to submit to a blood alcohol test. Once a person refuses, the police are not obligated to give the person a second opportunity to comply with the statute."). Rules of this sort have no bearing on our constitutional analysis; state law cannot render reasonable that which is not.[6] If the

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[6] The one bite rule doesn't purport to be a creature of the fourth amendment; it's a rule about administrative sanctions.

(Continued on following page)

government is going to use force to pin someone to a chair, stick a needle in his arm and drain blood from his vein, against his will and despite his acquiescence in an effective alternative, it had better have a reason. Because the government offered none, I agree that the jury's verdict for Hammer must be affirmed.

FERNANDEZ, Circuit Judge, with whom BROWNING, GOODWIN, BEEZER, and THOMPSON, Circuit Judges, join, Dissenting:

I respectfully dissent. I believe that the majority misperceives either the scope of the fourth amendment or the strength of the evidence presented to the jury in this case.

I do agree that this case is controlled by *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). In *Schmerber*, the Supreme Court sketched the scope of fourth amendment strictures when police extract blood from an unconsenting person. It is clear that the extraction need not be carried out under authority of a

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(Continued from previous page)

Under it, a suspect's driver's license can be suspended if he refuses to submit to a blood, breath or urine test, even if he consents to one later on. *See Dunlap v. Department of Motor Vehicles*, 156 Cal.App.3d 279, 283, 202 Cal.Rptr. 729 (1984); *Morphew v. Department of Motor Vehicles*, 137 Cal.App.3d 738, 743-44, 188 Cal.Rptr. 126 (1982). But no one disputes that Hammer's initial refusal put him in violation of California's implied consent law and that his driver's license could be suspended despite his belated consent. The question is whether it was reasonable to use force to draw blood despite his willingness to submit to another test. That issue is governed by the Constitution, not the California Vehicle Code. We should not confuse one for the other.

warrant if the extraction is necessary to preserve evanescent evidence.[1] 384 U.S. at 770, 86 S.Ct. at 1835. It is also clear that the police are entitled to use some physical force in order to successfully extract the blood sample. *See Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). Therefore, the fourth amendment did not prohibit Officer Zatarain from using some force to extract blood from Hammer.

As the majority agrees, the analysis is not altered by the fact that California has adopted a statute which mandates that the state's Department of Motor Vehicles suspend the license of any person who refuses to submit to a blood alcohol test after reasonably being requested to do so by a police officer. Cal.Veh.Code § 13353(a) (West's Supp. 1990). The California courts have repeatedly indicated that section 13353 does not alter the analysis of fourth amendment claims. *See People v. Ryan*, 116 Cal.App.3d 168, 82-83, 171 Cal.Rptr. 854 (1981) (section 13353 did not alter constitutional analysis of fourth amendment claims); *People v. Puccinelli*, 63 Cal.App.3d 742, 746, 135 Cal.Rptr. 534 (1976) ("It is also clear that the right to obtain and utilize [forced blood extractions] under the authority of *Schmerber* has not been eliminated by the enactment of section 13353.") The California courts have also wisely indicated that section 13353 grants a person a single opportunity to submit to a blood alcohol test. Once a person refuses, the police are not obligated to

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[1] Of course, *Schmerber* and the other cases in this area are driven by the fact that evidence of intoxication is indeed evanescent. Thus, delays substantially affect the accuracy of testing.

give the person a second opportunity to comply with the statute. *See Dunlap v. Department of Motor Vehicles*, 156 Cal.App.3d 279, 283, 202 Cal.Rptr. 729 (1984) (police not required to give person second opportunity to take blood alcohol test after initial refusal); *Morphew v. Department of Motor Vehicles*, 137 Cal.App.3d 738, 743-44, 188 Cal.Rptr. 126 (1982) (person lawfully arrested for drunk driving may not avoid impact of section 13353 by frustrating officer's ability to administer blood alcohol test). I say this is a wise approach because, whatever might seem ideal to those who have months to ruminate on the situation, it does not seem reasonable to require officers to deal with a driver's tergiversation about tests. At any rate, California has done nothing to alter the application of the fourth amendment; the outcome of this case is controlled entirely by *Schmerber* and its progeny.

Given that the police were entitled to use some physical force to extract a blood sample from Hammer, the issue remaining is whether the force used was excessive. The majority correctly notes that the issue is generally one for the jury to decide. *Reed v. Hoy*, 909 F.2d 324, 329-30 (9th Cir. 1989), *modified on other grounds and reh'g denied*, No. 87-4324, slip op. 7655 (9th Cir. July 18, 1990). However, in this case there was no evidence from which a reasonable jury could conclude that Officer Zatarain used excessive force. Zatarain did not initiate the use of physical force nor did he use more than was minimally necessary to safely extract the blood sample. On the contrary, he used almost no force at all. As the panel pointed out, and the majority appears to accept, the officer inflicted no violence whatever upon Hammer's person. Any injury occurred as Hammer tried to jump away from the needle,

for those activities caused both him and the officer to fall to the floor.[2]

While the majority avoids saying so, the effect of its decision is that blood cannot be extracted from a drunk who refuses to have it done, and that is particularly so if the drunk is willing to become the least bit physical about it. That is unfortunate, because whatever one might think about atrocious amounts of force being used for trivial purposes, those thoughts do not define this case. Rather, this is a case where the force itself was trivial and the need to protect the public from the atrocities wrought by this sort of crime – drunk driving – is compelling. In short, even viewing the evidence in the light most favorable to Hammer, as we must, the only reasonable conclusion is that the defendants were entitled to judgment as a matter of law.[3] *See Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1360 (9th Cir.

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[2] Here is Hammer's testimony about the incident: "Q. What's the next thing that happened after she [the nurse] started swabbing your arm? A. Well, when she started to put the needle in my arm, then I jumped. I was saying, no, you are not going to take my blood. And I jumped with him and the chair, and he was trying to hold me down, and I was trying to get away from the needle before she stuck it in my arm. Q. What happened? A. He was pushing me down. I was trying to get away. We both went over onto the ground. Q. With him on top of you? A. He was behind me, like somewhat wrestling with me."

[3] Perhaps the typically persuasive argument of Hammer's experienced counsel induced the jury to think that any force whatever was too much. If so, it was led into error. Led or not, err it did.

1986), *cert. denied*, 484 U.S. 826, 108 S.Ct. 92, 98 L.Ed.2d 53 (1987).

Finally, I agree that people under arrest, even drunks, must be treated with humanity and justice. The Constitution demands no less. But police officers are humans and citizens also. They, too, deserve to be treated with justice and with respect for their humanity. When they do their jobs properly, judges and juries should not call them lawbreakers and annullers of our Constitution. I fear that the majority does an injustice to the City and to these officers and makes it considerably more difficult for others to do their jobs when faced with recalcitrant citizens.

I would, therefore, uphold the decision of the panel and reverse that of the district court.

APPENDIX B

Timothy HAMMER, Plaintiff-Appellee,

v.

Charles GROSS; Armando Zatarain; Newport Beach City, Defendants-Appellants,

Timothy HAMMER, Plaintiff-Appellant,

v.

Charles GROSS; Armando Zatarain, Newport Beach City; Linda Delapena, et al., Defendants-Appellees.

Nos. 87-6682, 88-5638.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 8, 1988.

Decided Sept. 6, 1989.

Before HALL, WIGGINS and THOMPSON, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Appeal No. 87-6682 presents the difficult constitutional question of how much, if any, physical force police officers may use to compel a drunk driving suspect to submit to chemical testing in order to obtain evidence of intoxication for use in a criminal prosecution. Plaintiff-appellee Timothy Hammer brought this action under 42 U.S.C. § 1983 (1982), against defendants-appellants City of Newport Beach, California, former Newport Beach police chief Charles Gross, and Newport Beach police officer Armando Zatarain. Hammer claims that Officer Zatarain used excessive force to obtain a blood sample

after lawfully arresting him for driving under the influence ("DUI") of alcohol, and that this use of excessive force was action under color of state law which deprived him of rights secured by the Fourth and Fourteenth Amendments to the United States Constitution.

On timely appeal from a final judgment that was based on a jury verdict in favor of Hammer appellants contend, *inter alia*, that the district court erred in denying their motions for directed verdict and judgment notwithstanding the verdict ("JNOV"). They argue that neither the officer's actions nor the City policy regarding the use of force were unconstitutional and that, in any event, the individual officers were entitled to qualified immunity. We reverse.

I

Viewing the evidence in the light most favorable to Hammer, the relevant facts for purposes of this section 1983 action are as follows. At approximately 4:00 a.m. on June 23, 1985, Timothy Hammer was arrested upon probable cause for driving under the influence of alcohol, after failing a series of field sobriety tests administered by defendant-appellant Armando Zatarain, a police officer employed by the City of Newport Beach, California.

After applying handcuffs, Zatarain told Hammer that he would be required to take one of three chemical tests (blood, breath, or urine) to determine his blood alcohol level. Hammer replied that he would refuse to take any of the tests because he thought "there was a good possibility" that a chemical test would indicate that he was intoxicated. Hammer later explained that he refused

because he doesn't like needles. Hammer also testified that he believed his driver's license would be suspended for six months if he refused to submit to all three tests.[1]

Zatarain transported Hammer to the emergency room in a Newport Beach hospital, Hoag Memorial, to obtain a blood sample. Upon arrival, Zatarain handcuffed Hammer by his right wrist to a hard plastic chair. Approximately five minutes later, Zatarain again asked whether Hammer would submit to a blood test; Hammer again verbally refused. At that point, Zatarain told a Hoag Hospital laboratory technologist, Linda De La Pena, to withdraw the blood sample despite Hammer's objections. Although Zatarain denied ever having touched Hammer from the time appellee was first seated in the chair in the emergency room until De La Pena completed the blood withdrawal, Hammer testified that the officer grabbed his shoulders from behind and held him down in the chair while De La Pena began to swab his left forearm with iodine. Hammer "jumped" when De La Pena attempted to insert the needle into his arm, at which point he and Zatarain, who continued trying to restrain Hammer as Hammer tried to "wrestle away" from the needle, both went over sideways onto the floor along with the chair to which Hammer was still handcuffed.

After picking Hammer up off the floor, Zatarain told Hammer that he was going to take the blood sample "the easy way or the hard way." Zatarain then went into the hallway, called in two other police officers to assist him

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[1] Hammer had previously been arrested on a DUI charge in 1980, and had passing familiarity with California drunk driving laws and penalties.

and De La Pena in administering the blood test, and threatened that they would throw Hammer to the floor and pin him down to complete the test if necessary. Hammer testified that at that point he said he would consent to a breath test "if that's what it's going to come to," but that Zatarain insisted upon the blood test and once again held Hammer down in the chair while De La Pena took the blood sample as the other officers watched.[2]

On September 23, 1985, Hammer filed this section 1983 action seeking compensatory damages from all defendants, and punitive damages from the individual defendants. Defendants moved for summary judgment on November 10, 1986, asserting that the individual defendants were entitled to qualified immunity and that, because Zatarain contended that he was five feet away from Hammer during the blood withdrawal, there was no genuine issue of material fact as to a violation of the Fourth or Fourteenth Amendments. The district court denied defendants' motion on December 8, 1986. No appeal was taken from that decision, and the case proceeded to jury trial on October 6, 1987.

After a three-day trial and a denial of defendants' motion for a directed verdict, the jury of six men rendered a verdict on October 8, 1987, in favor of plaintiff-appellee Hammer, and assessed compensatory and punitive damages against Zatarain and Gross, and compensatory damages against the City of Newport Beach. The

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[2] Hammer apparently entered a plea of no contest to the criminal DUI charge in this case; he was sentenced to attend three alcohol rehabilitation classes in the "3-D Program."

district court denied defendants-appellants' motions for judgment notwithstanding the verdict, and for a new trial, in a hearing held on November 16, 1987, and entered an order of final judgment the following day. Defendants timely appeal from that judgment.[3]

II

We consider first whether the district court erred in refusing to grant appellants' motions for directed verdict and for judgment notwithstanding the verdict ("JNOV"). This court applies the same test when reviewing a district court ruling on either of these motions, and our inquiry on appeal is identical to that of the district court. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1360 (9th Cir.1986), *cert. denied*, 484 U.S. 826, 108 S.Ct. 92, 98 L.Ed.2d 53 (1987). That is, viewing the evidence as a whole in the light most favorable to the nonmoving party and drawing all inferences in favor of that party, we must decide de novo whether there was substantial evidence to support the jury's verdict or, on the contrary, whether the only reasonable

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[3] On December 7, 1987, the district court held a hearing on Hammer's application, filed pursuant to 42 U.S.C. § 1988, for an award of $51,125 in attorney's fees. In an order entered on January 20, 1988, Judge Hatter awarded fees in the amount of $23,000. Hammer timely appeals, in No. 88-5638, from this judgment. Because we are reversing the judgment that formed the basis for the district court's "prevailing party" determination, the attorney's fee award must be vacated. We do not, therefore, reach the question raised by Hammer about the propriety of awarding less than half the amount of fees requested.

conclusion is that the moving party is entitled to judgment as a matter of law. *Id.; Peterson v. Kennedy*, 771 F.2d 1244, 1252, 1256 (9th Cir.1985), *cert. denied*, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986). We also review de novo all questions of federal and state law. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984); *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir.1984) (en banc).

It is well-settled that a plaintiff in a section 1983 action must show: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the claimant of a right secured by the Constitution or federal law. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13, 68 L.Ed.2d 420 (1981). Appellants do not challenge Hammer's showing of action under color of state law. They do, however, argue that Hammer has failed as a matter of law to prove any deprivation of a constitutional or federal right in this case.

A

Until very recently, there were two arguably overlapping constitutional theories under which a plaintiff could proceed in a section 1983 action seeking damages against arresting officers who subjected him to physical force to obtain blood sample evidence for use in a DUI prosecution. The first was a theory that the particular search and seizure of blood alcohol evidence was "unreasonable" and, hence, a violation of the Fourth Amendment. A line of Supreme Court cases, beginning with *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966),

and most recently including *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), would have controlled the Fourth Amendment issue in such an action.

The second theory was that the application of force by police in conducting the search and seizure was excessive in that it was "intentional, unjustified, brutal, and offensive to human dignity" in light of the need and purpose for which force was applied and, hence, a denial of substantive due process guaranteed by the Fourteenth Amendment. *See Rinker v. Napa County*, 831 F.2d 829, 831 (9th Cir.1987); *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1446 (9th Cir.1986); *Meredith v. Arizona*, 523 F.2d 481, 484 (9th Cir.1975) (adopting standard from *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973)).[4] The leading Supreme Court cases in this substantive due process area, in addition to *Schmerber*, were *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and *Breithaupt v. Abram*, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957).

In their briefs, the parties strongly disagree as to the applicability, meaning, and limits of these cases. Appellants argue that *Schmerber* authorized the use of force to obtain a blood sample, so long as the force employed does not exceed the *Rochin* prohibition regarding force that "shocks the conscience." Hammer, on the other hand,

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[4] This standard remained as the applicable test for constitutional claims seeking damages for police use of "excessive force" in the arrest/seizure context, *see* Devitt, Blackmar and Wolff, 3 *Federal Jury Practice and Instructions* § 103.08 (4th Ed.1987), until the Supreme Court decided *Graham v. Connor*, ___ U.S. ___, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

argues that *Schmerber* prohibits both police initiation of violence in the taking of a blood sample and the use of "inappropriate force" in response to resistance by a DUI suspect. Hammer further contends that the "shocks the conscience" standard is no longer good law, and that Fourth Amendment "reasonableness" is the constitutional standard applicable to claims of excessive force in the arrest context.

While this appeal was pending, the Supreme Court announced its decision in *Graham v. Connor*, ___ U.S. ___, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), holding that *"all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* 109 S.Ct. at 1871 (emphasis original). Although the *Graham* Court specifically declined to decide whether the Fourth Amendment provides protection against the deliberate use of excessive force "beyond the point at which arrest ends and pretrial detention begins," 109 S.Ct. at 1871 n. 10, we think *Graham* controls this appeal. Because it involves the use of physical compulsion in connection with a search and seizure conducted as an incident of his arrest, *see Schmerber*, 384 U.S. at 771, 86 S.Ct. at 1836 (attempt to secure evidence of blood-alcohol content in that case was appropriate incident to petitioner's arrest), Hammer's "excessive force" claim is properly analyzed under Fourth Amendment principles.

B

In *Schmerber,* the Supreme Court decided that a warrantless search for and seizure of a blood sample,[5] obtained in a medically acceptable manner without the use of physical force but over the verbal objections of a misdemeanor DUI suspect who had been lawfully arrested upon probable cause after being hospitalized for injuries sustained in a drunk-driving accident, did not violate the Fourth Amendment prohibition against "unreasonable searches and seizures." 384 U.S. at 772, 86 S.Ct. at 1836. Accordingly, the Court held that the results of the chemical analysis[6] performed on the blood sample

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[5] Although it did not use the term in *Schmerber,* the Court has since declared that a compulsory blood extraction procedure, undertaken to obtain chemical evidence of intoxication, is a "search" for purposes of the Fourth Amendment. *Winston,* 470 U.S. at 759, 105 S.Ct. at 1616; *Skinner v. Ry. Labor Exec. Ass'n,* ___ U.S. ___, 109 S.Ct. 1402, 1412, 103 L.Ed.2d 639 (1989). The Court has also indicated that, to the extent it is viewed as a meaningful interference with a possessory interest in one's bodily fluids, the taking of a blood sample may also be a "seizure" within the meaning of the Fourth Amendment. *Skinner,* 109 S.Ct. at 1413 n. 4.

[6] This court recently held that the chemical analysis of a blood sample obtained in conformity with *Schmerber* has no independent significance for Fourth Amendment purposes regardless of how promptly the test is conducted. *United States v. Snyder,* 852 F.2d 471, 474 (9th Cir.1988). *But cf., Skinner,* 109 S.Ct. at 1412 (compelled physical intrusion penetrating beneath the skin infringes subject's reasonable expectations of privacy; chemical analysis of blood sample to obtain physiological data is further invasion of the tested person's privacy interests).

could be admitted into evidence in the subsequent criminal DUI prosecution. 384 U.S. at 772, 86 S.Ct. at 1836.[7]

The *Schmerber* Court's methodology, in deciding whether the particular bodily intrusion at issue in that case was "reasonable" within the meaning of the Fourth Amendment, is instructive. First, the Court recognized that the ordinary requirements of the Fourth Amendment – probable cause and a warrant or an exception, such as exigent circumstances, justifying a warrantless intrusion – were to be threshold requirements for conducting a search and seizure entailing intrusion beneath the surface of the skin. *Schmerber*, 384 U.S. at 768-71, 86 S.Ct. at 1834-36; *see also Winston v. Lee*, 470 U.S. at 760-61, 105 S.Ct. at 1616-17.[8]

In the second part of its "reasonableness" analysis, the *Schmerber* Court analyzed separately the particular

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[7] The *Schmerber* Court emphasized the fact-specificity of its holding, saying that "we reach this judgment only on the facts of the present record" involving "a minor intrusion" conducted under "stringently limited conditions." *Schmerber*, 384 U.S. at 772, 86 S.Ct. at 1836. The Court also cautioned against reading its opinion as indicating that the Constitution permits "more substantial intrusions, or intrusions under other conditions." *Id.*

[8] The *Schmerber* Court held that the blood extraction in that case was supported by probable cause, and that it was constitutionally permissible to proceed without a warrant because of the exigent circumstances requiring prompt detection of evanescent blood alcohol levels. 384 U.S. at 770-71, 86 S.Ct. at 1835-36.

Hammer raises neither the probable cause nor the warrant requirement as an issue in this case.

type of intrusive procedure and the manner in which the test was performed. *Schmerber,* 384 U.S. at 771-72, 86 S.Ct. at 1836. The Court held that the withdrawal of a minimal amount of blood, using a procedure that "involves virtually no risk, trauma, or pain," was a reasonable test for measuring blood alcohol. *Id.* at 771, 86 S.Ct. at 1836. The Court then decided that the simple blood test in that case, "taken by a physician in a hospital environment according to accepted medical practices," had been undertaken in a reasonable manner. *Id.*[9]

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[9] In discussing the defendant's substantive due process claim, the *Schmerber* Court saw no reason to distinguish between the situation of *Schmerber* and that in *Breithaupt,* 352 U.S. 432, 77 S.Ct. 408, where the results of a blood alcohol test, taken in a hospital by a physician from an unconscious DUI suspect who had been seriously injured in a [sic] automobile accident in which three persons were killed, were admitted into evidence over a due process objection raised in the subsequent involuntary manslaughter prosecution. *Schmerber,* 384 U.S. at 760 n. 4, 86 S.Ct. at 1830 n. 4. The *Schmerber* Court declined to overrule the holding in *Breithaupt,* 352 U.S. at 435, 77 S.Ct. at 410, that it did not offend "that 'sense of justice' of which we spoke in *Rochin* . . . " to admit into evidence the results of non-consensual blood tests administered in the circumstances of the two cases. *Schmerber,* 384 U.S. at 760, 86 S.Ct. at 1830.

Although the Court found no substantive due process violation on the facts of *Schmerber* and *Breithaupt,* and seemed to say that there would be no due process violation if police used force to restrain a suspect who initiated physical violence to communicate a refusal to consent to a blood test, the Court said, "It would be a different case *if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force.*" *Schmerber,* 384 U.S. at 760 n. 4, 86 S.Ct. at 1830 n. 4. (emphasis added).

Recently, the Supreme Court further explicated the methodology for deciding whether a search involving a bodily intrusion is "reasonable" within the meaning of the Fourth Amendment. *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611.[10] In *Winston*, the Court invoked *Schmerber* to analyze a proposed surgical intrusion, under general anesthesia, into the chest muscle of an armed robbery suspect to search for evidence (a bullet allegedly fired by the shopkeeper victim of the attempted robbery) of the offense charged. The Court held that the Fourth Amendment would not permit such an "unreasonable" intrusion. *Winston*, 470 U.S. at 766, 105 S.Ct. at 1619-20. Although it was far from clear in the earlier opinion, the *Winston* Court described the *Schmerber* test of "reasonableness" as one in which the individual's interests in "personal privacy and bodily integrity" are balanced against the state's interest in "fairly and accurately determining guilt or innocence." *Winston* 470 U.S. at 762, 105 S.Ct. at 1617.

Even more recently, the Court announced a set of principles for testing the "reasonableness" of a particular use of force in the course of an arrest. *Graham*, 109 S.Ct. at 1871-72. The Court reiterated that

> "[d]etermining whether the use of force to effect a particular seizure is 'reasonable' under

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[10] The Supreme Court has also invoked *Schmerber* in contexts other than searches entailing an invasion of the suspect's bodily privacy and integrity. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1984) (*Schmerber* balancing employed to hold that the use of deadly force against an unarmed and nondangerous fleeing felon is an unreasonable seizure in violation of the Fourth Amendment).

> the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."

Id. at 1871 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985)) (internal quotation omitted). The *Graham* Court specifically mentioned "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" as factors to consider in assessing the reasonableness of the use of force to effect a particular seizure. 109 S.Ct. at 1871. On the other hand, the Court declared that the arresting officer's subjective intent "has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment." *Id.* Finally, the Court emphasized that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." 109 S.Ct. at 1872.

C

With the foregoing principles in mind, we turn to the central issue in this appeal: whether Zatarain's use of physical force to compel Hammer to submit to a blood test in the circumstances of this case rendered the search for and seizure of blood alcohol evidence "unreasonable," within the meaning of the Fourth Amendment, under the balancing test prescribed by *Schmerber, Winston,* and

Graham. It is the forcible manner in which Zatarain conducted the "search and seizure" of Hammer's blood sample with which we are primarily concerned.

It is important to note that the state interests in the instant case weigh into the balance almost exactly as they did in *Schmerber* itself. Hammer was arrested on a misdemeanor DUI charge and subjected to the "highly effective" blood alcohol test, *Schmerber*, 384 U.S. at 771, 86 S.Ct. at 1836, the results of which are of "vital importance" to the fair and accurate enforcement of the state's drunk driving laws.[11] *Winston*, 470 U.S. at 763, 105 S.Ct. at 1618.

On the "individual interest" side of the scales, the actual blood test in this case – involving virtually no risk, trauma, or pain, and requiring the extraction of only a minimal amount of blood – was also substantially identical to the one administered in *Schmerber*. When the DUI suspects in both *Schmerber* and the instant case verbally refused to consent to the blood withdrawal, moreover,

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[11] If anything, the state interests in the circumstances of the *Schmerber* case were slightly stronger than those implicated here. Schmerber had apparently been driving drunk at about midnight when his car "skidded, crossed the road and struck a tree." *Schmerber*, 384 U.S. at 758 n. 2, 86 S.Ct. at 1829 n. 2. Both Schmerber and a passenger in his car were injured in the accident. *Id*.

In the instant case, Hammer was driving the only car on the road at 4:00 a.m., and was stopped only for exceeding the speed limit. The Supreme Court has noted that the "severity of the crime at issue" is a factor to which courts should give careful attention in determining the Fourth Amendment reasonableness of a search or seizure. *Graham*, 109 S.Ct. at 1872.

the procedure was carried out over their objections in a hospital setting by a qualified medical professional.

The key differences between *Schmerber* and the instant case are the use of force by Officer Zatarain, and the availability in California of certain types of legal coercion as alternatives to the use of force. We must consider how these two factors affect the Fourth Amendment balance that was struck in favor of the state in *Schmerber,* in order to determine whether a reasonable jury could find, on the basis of substantial evidence, that Zatarain subjected Hammer to an unreasonable search and seizure.

1

The availability of other forms of legal, as opposed to physical, coercion arguably cuts against a finding of reasonableness where police fail to utilize those alternatives. In particular, after *Schmerber* was handed down, the California legislature enacted an implied consent law. Cal.Veh.Code § 13353, as "an additional or alternative method of compelling a person arrested for drunk driving to submit to a test for intoxication, by providing that such person will lose his automobile driver's license for a period of six months if he refuses to submit to a test for intoxication." *People v. Superior Court of Kern County (Hawkins),* 6 Cal.3d 757, 765, 100 Cal.Rptr. 281, 286, 493 P.2d 1145, 1150 (1972).[12] The effect of that legislation,

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[12] Apparently, in many other states, statutes prohibit the use of force by police officers to obtain chemical evidence of intoxication without the consent of the DUI suspect. *See* Note,

(Continued on following page)

according to the California Supreme Court, was "to equip peace officers with an instrument of enforcement not involving physical compulsion." *Id.* The constitutionality of section 13353 was sustained by the California Supreme Court in *Hernandez v. Dept. of Motor Vehicles*, 30 Cal.3d 70, 177 Cal.Rptr. 566, 634 P.2d 917 (1981).[13]

Another legal means for "compelling" DUI suspects to submit to blood (or breath or urine) testing was established in 1982. That year, the United States Supreme Court cleared away the constitutional obstacles that

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(Continued from previous page)

" 'Shed Thou No Blood': The Forcible Removal of Blood Samples from Drunk Driving Suspects," 60 So.Cal.L.Rev. 1115, 1117 (1987), and accompanying notes. Even in states that do not prohibit the use of reasonable force, many law enforcement agencies have restricted their own discretion by developing policies or regulations that narrowly define the circumstances in which the use of force is permissible. *See id.* at 1118 n. 18, citing California Highway Patrol General Order 100.3, "Chemical Tests – Implied Consent Law," (rev. April 1986) (physical compulsion may be used, with supervisory approval, only if chemical test evidence is essential to felony DUI prosecution of driver involved in accident involving death or permanently disabling injury, and only if medically qualified person consents to do extraction notwithstanding the driver's resistance).

[13] The California courts have held that "the desirability of obtaining blood samples in a non-coercive manner by one of the tests provided for in section 13353 may not be equated with constitutionality," and that the results of chemical analysis performed on a blood sample forcibly removed are admissible in a criminal DUI prosecution, "provided that (a) the removal is done in a reasonable, medically approved manner; (b) is incident to the defendant's arrest; and (c) is based upon the reasonable belief that the person is intoxicated." *People v. Ryan*, 116 Cal.App.3d 168, 182 171 Cal.Rptr. 854, 861 (1981); *see also People v. Puccinelli*, 63 Cal.App.3d 742, 746, 135 Cal.Rptr. 534, 536 (1976).

might otherwise have faced prosecutors who sought to introduce the refusal by a DUI suspect to submit to a blood-alcohol test as substantive evidence of guilt in a criminal DUI prosecution. *South Dakota v. Neville,* 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (refusal to submit to blood alcohol test was not testimonial expression by which a DUI defendant was compelled to incriminate himself, and admitting evidence of refusal without prior warning that it would be used in prosecution did not render proceedings fundamentally unfair).[14]

With these alternative weapons for fighting the war against drunk drivers established, Hammer contends that the use of *any* amount of force by police officers to obtain blood alcohol evidence renders the "search" for it unreasonable within the meaning of the Fourth Amendment. For the following reasons, we decline to adopt the rule Hammer urges.

2

The use of force or physical restraint bears on the reasonableness of the *manner* in which the blood test was carried out, and weighs into the *Schmerber* balance as a factor in assessing the "nature and quality of the intrusion on the individual's Fourth Amendment interests," *Graham,* 109 S.Ct. at 1871. *See Skinner,* 109 S.Ct. at 1413

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[14] The California courts have likewise held that admitting the unwarned refusal of a DUI suspect to submit to a blood alcohol test does not violate the privilege against self incrimination. *People v. Municipal Court for Visalia (Gonzales),* 137 Cal.App.3d 114, 117, 186 Cal.Rptr. 716, 718 (1982).

(any limitation on a person's freedom of movement necessary to obtain the blood, urine, or breath samples must be considered in assessing the intrusiveness of the search). The problem is to determine how much weight to give this factor.

In fact, the "force" used by Officer Zatarain in this case was nothing more than the application of physical restraint required to conduct the blood extraction in a safe and efficient manner. As the Supreme Court recently observed, "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 109 S.Ct. at 1871. We think that jurisprudence also validates the particular application of force to effectuate the search and seizure which occurred in this case.

The *Graham* Court further noted that " 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' *Johnson v. Glick*, 481 F.2d at 1033, violates the Fourth Amendment." 109 S.Ct. at 1872. Although we, like the California Supreme Court, recognize that the forcible removal of a blood sample from a DUI suspect will virtually always be "unpleasant, undignified and undesirable," *People v. Superior Court (Hawkins)*, 6 Cal.3d at 764, 100 Cal.Rptr. at 286, 493 P.2d at 1150, it will not always be – and was not in this case – unconstitutional.

Because the amount of force applied was minimal, and did not exceed the amount necessary to effect the otherwise lawful search for and seizure of blood alcohol

evidence which occurred in the circumstances of this case, we hold as a matter of law that Officer Zatarain's conduct was not "unreasonable" within the meaning of the Fourth Amendment.[15] Having thus failed to establish that he was deprived of any right secured by the Fourth Amendment, Hammer's section 1983 claims against both the individual and municipal defendants must fall.[16]

The judgment of the district court is REVERSED.

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[15] We are well aware that the "reasonableness" test is a difficult one to apply consistently, *i.e.*, in a principled fashion, on a case-by-case basis. We note that the California courts have found it particularly difficult to analyze claims of excessive force brought by DUI suspects. *Compare People v. Kraft*, 3 Cal.App.3d 890, 84 Cal.Rptr. 280 (1970) (results of blood alcohol test suppressed because use of a scissors lock on the legs of a "defensive" DUI suspect was excessive under the circumstances and not "medically acceptable"), with *Carleton v. Superior Court*, 170 Cal.App.3d 1182, 216 Cal.Rptr. 890 (1985) (blood alcohol evidence was properly admitted because use of force by five police officers, one of whom used choke hold while other four pinned combative DUI suspect face-down on floor of isolation cell to facilitate extraction of blood sample, was reasonable and did not "shock the conscience" of the court).

[16] Because we find no violation of a federal right in this case, we need not reach any of the other issues, including the question of the individual defendants' entitlement to qualified immunity, raised by the appellants.

APPENDIX C

13353. (a)(1) Any person who drives a motor vehicle shall be deemed to have given his or her consent to chemical testing of his or her blood, breath, or urine for the purpose of determining the alcoholic content of his or her blood, and to have given his or her consent to chemical testing of his or her blood or urine for the purpose of determining the drug content of his or her blood, if lawfully arrested for any offense allegedly committed in violation of Section 23152 or 23153. The testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23152 or 23153. The person shall be told that his or her failure to submit to, or the noncompletion of, the required chemical testing will result in (A) the suspension of the person's privilege to operate a motor vehicle for a period of six months, (B) the suspension of the person's privilege to operate a motor vehicle for a period of one year if the person has previously been convicted of a violation of Section 23152, 23153, or 23103 as specified in Section 23103.5 within five years of the date of the refusal, or (C) the revocation of the person's privilege to operate a motor vehicle for a period of three years if the person has previously been convicted of two or more violations of Section 23152, 23153, or 23103 as specified in Section 23103.5 within five years of the date of the refusal.

(2) (A) If the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person shall have the choice of whether the test shall be of his or her blood, breath, or urine, and the person shall be

advised by the officer that he or she has that choice. If the person arrested either is incapable, or states that he or she is incapable, of completing any chosen test, the person shall then have the choice of submitting to and completing any of the remaining tests or test, and the person shall be advised by the officer that the person has that choice.

(B) If the person is lawfully arrested for driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug, the person shall have the choice of whether the test shall be of his or her blood, breath, or urine, and the person shall be advised by the officer that he or she has that choice.

A person who chooses to submit to a breath test may also be required to submit to a blood or urine test if the officer has reasonable cause to believe that the person was driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug and if the officer has a clear indication that a blood or urine test will reveal evidence of the person being under the influence. The officer shall state in his or her report the facts upon which that belief and that clear indication are based. The person shall have the choice of submitting to and completing a blood or urine test, and shall be advised by the officer that he or she is required to submit to an additional test and that he or she may choose a test of either blood or urine. If the person arrested either is incapable, or states that he or she is incapable, of completing either chosen test, the person shall then have the choice of submitting to and completing the other remaining test, and the person shall be advised by the officer that the person has that choice.

(3) If the person is lawfully arrested for an offense allegedly committed in violation of Section 23152 or 23153, and, because of the need for medical treatment, the person is first transported to a medical facility where it is not feasible to administer a particular test of, or to obtain a particular sample of, the person's blood, breath, or urine, the person shall have the choice of those tests which are available at the facility to which that person has been transported. In such an event, the officer shall advise the person of those tests which are available at the medical facility and that the person's choice is limited to those tests which are available.

(4) The person shall also be advised by the officer that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and shall also be advised by the officer that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law.

(5) Any person who is unconscious or otherwise in a condition rendering him or her incapable of refusal shall be deemed not to have withdrawn his or her consent and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the noncompletion of, the test or tests will result in the suspension of his or her privilege to operate a motor vehicle. Any person who is dead shall be deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer.

(b) If any person refuses the officer's request to submit to, or fails to complete, a chemical test or tests, upon receipt of the officer's sworn statement that the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23152 or 23153 and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer, the department shall (1) suspend the person's privilege to operate a motor vehicle for a period of six months, (2) suspend the person's privilege to operate a motor vehicle for a period of one year if the person has previously been convicted of a violation of Section 23152, 23153, or 23103 as specified in Section 23103.5 within five years of the date of the refusal, or (3) revoke the person's privilege to operate a motor vehicle for a period for three years if the person has previously been convicted of two or more violations of Section 23152, 23153, or 23103 as specified in Section 23103.5 within five years of the date of the refusal. The officer's sworn statement shall be submitted on a form furnished or approved by the department. The suspension or revocation shall not become effective until 10 days after the giving of written notice thereof, as provided for in subdivision (c).

(c) (1) The department shall immediately notify the person in writing of the action taken and, upon the person's request in writing and within 15 days from the date of receipt of that request, shall grant the person an opportunity for a hearing in the same manner and under the same conditions as provided in Article 3 (commencing with Section 14100) of Chapter 3, except as otherwise provided in this section. For purposes of this section, the scope of the hearing shall cover the issues of whether the

peace officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section 23152 or 23153, whether the person was placed under arrest, whether the person refused to submit to, or did not complete, the test or tests after being requested by a peace officer, and whether, except for the persons described in subdivision (a) who are incapable of refusing, the person had been told that his or her driving privilege would be suspended or revoked if he or she refused to submit to, or did not complete, the test or tests.

(2) An application for a hearing made by the affected person within 10 days of receiving notice of the department's action shall stay the suspension or revocation by the department for a period of 15 days. The department shall, within the period of 15 days, hold a hearing in the county in which the violation occurred. If the department does not grant a hearing within 15 days, the suspension or revocation shall not take place until the person is granted a hearing and is notified of the department's action as provided in paragraph (3). If the county in which the violation occurred is also the county of the person's residence, and the person requests that the hearing be continued to a date beyond the period of 15 days, the suspension or revocation shall become effective immediately upon receipt of the department's notice that the request for continuance has been granted. If the hearing is to be held in a county other than the county of the person's residence, the department shall, upon request, grant the person a continuance of up to 15 days, and shall not suspend or revoke the license until after that time.

(3) If the department determines, upon a hearing of the matter, to suspend or revoke the affected person's

privilege to operate a motor vehicle, the suspension or revocation shall not become effective until five days after receipt by the person of the department's notification of that suspension or revocation.

(d) Any person who is afflicted with hemophilia is exempt from the blood test required by this section.

(e) Any person who is afflicted with a heart condition and is using an anticoagulant under the direction of a licensed physician and surgeon is exempt from the blood test required by this section.

(f) A person lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle in violation of Section 23152 or 23153 may request the arresting officer to have a chemical test made of the arrested person's blood, breath, or urine for the purpose of determining the alcoholic content of that person's blood, and, if so requested, the arresting officer shall have the test performed.

Supreme Court, U.S.
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No. 91-270

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CITY OF NEWPORT BEACH, a California City,
Petitioner,

v.

TIMOTHY HAMMER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

BRIEF OF AMICUS CURIAE, STATE OF CALIFORNIA, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Joined by the States of Delaware, Idaho, Indiana, Maine, Mississippi, Missouri, New Hampshire, Nevada, South Carolina, South Dakota; California Counties of Orange and Trinity; City and County of San Francisco; California Cities of Irvine, Laguna Beach, Lawndale, Long Beach, Los Angeles, San Clemente, San Diego, Signal Hill, and Yorba Linda; California Police Officer's Association; California Police Chief's Association; California State Sheriff's Association; and Mothers Against Drunk Driving, National Organization and California State Organization; in support of the City of Newport Beach, Petitioner.

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QUESTIONS PRESENTED

1. Did Graham v. Connor, 490 U.S. 386 (1989), overrule the Schmerber v. California, 384 U.S. 757 (1966), test for determining the constitutionality of the extraction of a blood sample from a nonconsenting drunk driving suspect?

2. Should Graham v. Connor, supra, be applied retroactively to nonconsensual extractions of blood from suspected drunk drivers, and, if so, can such retroactive application be used to render a formerly constitutional city policy unconstitutional for purposes of imposing 42 U.S.C. section 1983 liability on the city?

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INTEREST OF AMICUS CURIAE

Amicus curiae is the State of California, joined by other states, California counties and municipalities and organizations interested in the successful prosecution of drunk drivers, and which depend upon blood tests to establish intoxication.[1/]

The effectiveness of these criminal sanctions against drunk driving depends largely on the ability of law enforcement officers to obtain chemical tests of suspected drunk drivers.[2/]

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1. Under California law the offense is defined as driving "under the influence," not "drunk driving," and the prosecution need prove only that the driver was "under the influence" of alcohol, a drug or a combination of the two. (Cal. Veh. Code, §§ 23152, 23153.)

However, for the sake of convenience, and because the offense is commonly referred to throughout the country as "drunk driving," we use the terms "driving under the influence" and "drunk driving" interchangeably herein.

2. In 1985, at the time of respondent Hammer's arrest, California law provided that it was unlawful for a person who had 0.10 percent or more, by

California follows the rule of Schmerber v. California, 384 U.S. 757 (1966). When a drunk driving arrestee refuses a chemical test, the driver's license of the arrestee is not only subject to revocation, but California law permits the officer, for criminal prosecution purposes, to obtain a blood sample from the arrestee under the conditions prescribed in Schmerber, using reasonable force, if necessary under the circumstances, to obtain the sample. (People v. Superior Court (Hawkins), 6 Cal.3d 757, 764-765, 100 Cal.Rptr. 281, 493 P.2d 1145 (1972); Carleton v. Superior Court, 170 Cal.App.3d 1182, 1187-1188 & fn. 1, 216 Cal.Rptr. 890 (1985); People v.

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weight, of alcohol in his blood to drive a vehicle. (Former Cal. Veh. Code, § 23152, subd. (b).)

Current California law has reduced the percent by weight of alcohol to 0.08 percent or more. (Current Cal. Veh. Code, § 23152, subd. (b).)

Ryan, 116 Cal.App.3d 168, 182, 171 Cal.Rptr. 854 (1981); People v. Puccinelli, 63 Cal.App.3d 742, 746, 135 Cal.Rptr. 534 (1976); People v. Brannon, 32 Cal.App.3d 971, 975-976, 108 Cal.Rptr. 620 (1973).)

The effect of the decision in this case, as noted by the five dissenting judges, "is that blood cannot be extracted from a drunk who refuses to have it done, and that is particularly so if the drunk is willing to become the least bit physical about it." (Hammer v. Gross, 932 F.2d 842, 855 (9th Cir. en banc 1991) dis. opn.)

The Ninth Circuit's decision will seriously impede the ability of law enforcement officers to enforce the law and to successfully prosecute drunk drivers.

SUMMARY OF ARGUMENT

This Court, as well as the California courts, has repeatedly emphasized the grave dangers posed by drunk drivers. (Michigan State Police v. Sitz, 496 U.S.___, 110 L.Ed 2d 412, 420-421 (1990).)

In California alone in 1990 there were 353,886 arrests for misdemeanor drunk driving, another 12,799 arrests for felony drunk driving[3/] and 22,915 cases where drivers licenses were revoked under California's Implied Consent Law because

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3. Under California law, the difference between misdemeanor and felony drunk driving is that felony drunk driving requires an act forbidden by law or neglect of any duty imposed by law in the driving of the vehicle, which proximately causes bodily injury to any person other than the driver (Cal. Veh. Code, § 23153.) Alternatively, the offense is a felony if the person has been convicted within the previous seven years of any combination of three or more separate violations of misdemeanor drunk driving, felony drunk driving or reckless driving reduced from a charge of misdemeanor drunk driving. (Cal. Veh. Code, § 23175, subd. (a).)

the suspected drunk driver refused to submit to a chemical test at the time of arrest. Over 60 times a day, every day of the year, California law enforcement officers alone are confronted with the situation presented by this case: a recalcitrant drunk driver who refuses to submit to a chemical test.

In Schmerber v. California, supra, 384 U.S. 757, this Court held under the Fourth Amendment that a blood sample could lawfully be obtained over the verbal objection of an arrested drunk driver who refused a chemical test, where there was probable cause for the drunk driver's arrest (Schmerber, supra, 384 U.S. at pp. 768-769), there was a "clear indication" the blood test would produce incriminating evidence of intoxication (Id., at pp. 769-770), and the blood sample was obtained "in a reasonable manner" and "according to

accepted medical practices" (Schmerber, supra, 384 U.S. at pp. 771-772).

The plurality of the en banc Ninth Circuit in this case limits Schmerber to cases where no physical resistance is offered by the suspect, and concludes that the jury could properly determine that any use of force was constitutionally excessive under the Fourth Amendment, based upon a five part test, derived from Graham v. Connor, 490 U.S. 386 (1989): (1) whether the suspect "actively resist[s]" the extraction of his blood"; (2) the severity of the crime at issue; (3) whether the suspect posed an immediate threat to the safety of the officers or others; (4) whether the police refused to respect a reasonable request to undergo a different form of testing; and (5) the degree of the authorities' need for the blood sample. (Hammer v. Gross,

supra, 932 F.2d 842, 846, plurality opinion.)

The plurality upholds the finding of a Fourth Amendment violation by the jury because: (1) respondent Hammer's offense of drunk driving "was a misdemeanor" (Hammer v. Gross, supra, 932 F.2d at p. 846; plurality opinion); (2) Hammer, a drunk driver, posed "no threat to the safety of the officers or others" (Ibid.); and (3) Hammer, after twice refusing any form of chemical test, belatedly agreed at the hospital to submit to a breathalyzer test as force was already being applied to obtain a blood sample. (Ibid.)

The plurality opinion misconstrues the significance and effect of Graham v. Connor, and misapplies it in the context of the taking of a blood sample of a lawfully arrested drunk driver, disregarding the express holding

of this Court in Schmerber.

The plurality opinion also misapplies the factors referred to in Graham v. Connor. The plurality improperly denigrates the "severity of the offense" since Hammer was guilty of only "misdemeanor" drunk driving. (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.) Similarly, the plurality opinion inexplicably concludes Hammer, a drunk driver, "certainly posed no threat to the safety of the officers or others." (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

The effect of the plurality opinion's five factor analysis would be to require jury trials "just about every time the police take blood," since two out of the five factors identified in the plurality opinion will routinely favor the drunk driver. (Hammer v. Gross, supra,

932 F.2d at p. 853 (Kozinski and Nelson, concurring.)

The analysis in the concurring opinion, which concludes that Hammer's belated consent to a breathalyzer test was sufficient by itself to render any use of force constitutionally unreasonable under the Fourth Amendment (Hammer v. Gross, supra, 932 F.2d at p. 851; Kozinski and Nelson, concurring), is equally faulty.

Although this Court suggested in Schmerber that a drunk driving suspect's "reasonable request" for an alternative form of chemical test might have to be respected (Schmerber, supra, 384 U.S. at p. 760, fn. 4) the officer here acted in a constitutionally reasonable manner in dealing with Hammer's "tergiversation about tests" (Hammer v. Gross, supra, 932 F.2d at p. 855, five judge dis. opn.)

There was no "reasonable request" for an alternative form of

chemical test, within the meaning of Schmerber. California law reasonably provides for a single refusal. Hammer had twice refused any and all chemical tests, his change of heart about taking a breathalyzer test came during the application of force by the officer necessary to obtain a blood sample, and Hammer testified at trial that he twice refused any form of chemical test not for any valid reason, but "because he thought 'there was a good possibility' that a chemical test would indicate that he was intoxicated." (Hammer v. Gross, supra, 932 F.2d at p. 844, plurality opinion.)

The effect of this decision will be to seriously impede the ability of law enforcement officers to enforce the drunk driving laws, and to encourage physical resistance and game playing by drunk driving suspects.

The instant case is doubly unfortunate, because there is no majority opinion resulting from this en banc Ninth Circuit review to guide officers in the future, and they and their employing agencies are left to guess in future cases as to their potential civil liability under 42 U.S.C. section 1983.

ARGUMENT

THE NINTH CIRCUIT EN BANC DECISION CONFLICTS WITH THIS COURT'S DECISION IN SCHMERBER V. CALIFORNIA, MISREADS THIS COURT'S DECISION IN GRAHAM V. CONNOR, AND SERIOUSLY JEOPARDIZES THE ENFORCEMENT OF STATES' DRUNK DRIVING LAWS BY ENCOURAGING PHYSICAL RESISTANCE AND GAME PLAYING BY DRUNK DRIVING SUSPECTS

In this case a closely divided (6-5, with no majority opinion) en banc Ninth Circuit has reversed a unanimous three judge panel decision, and upheld a

jury award of money damages[4/] in a civil rights action under 42 U.S.C. section 1983 for a Fourth Amendment violation, where a police officer, using only minimal and reasonable force, obtained a blood sample from a resisting drunk driving arrestee who refused any chemical test, under circumstances satisfying all the requirements for obtaining a blood sample established by this Court in Schmerber v. California, supra, 384 U.S. 757.

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4. The award against the individual officer and the chief of police was unanimously overturned by the en banc Ninth Circuit on qualified immunity grounds. (Hammer v. Gross, supra, 932 F.2d at p. 850.)

This does not affect the basic Fourth Amendment issue presented by this case. The municipality was held liable in this case for a Fourth Amendment violation by the officer who took the blood sample. Moreover, after this decision, it is doubtful whether individual officers will be able to rely on even a defense of qualified immunity in the enforcement of California's drunk driving laws, since the Ninth Circuit has upheld a jury verdict finding a Fourth Amendment violation in this case.

The en banc Ninth Circuit reaches this conclusion by erroneously limiting the applicability of this Court's decision in Schmerber to cases where there is no physical resistance by the drunk driving suspect and no use of force by the officer to obtain a blood sample, based upon its misreading and misapplication of this Court's recent decision in Graham v. Connor, supra, 490 U.S. 386.

It is important to emphasize at the outset what this case does not involve. The amount of force used by the officer in this case to obtain a blood sample was not excessive. The amount of force used in this case is accurately characterized in the dissenting opinion in this case as "trivial," and no more than "was minimally necessary to safely extract the blood sample." (Hammer v. Gross, supra, 932 F. 2d at p. 855, five judge dis. opn.) This is not disputed in either

the plurality or concurring opinions upholding the jury verdict against the City of Newport Beach. Instead, the Ninth Circuit upheld the jury verdict in this case on the rationale that the use of any force in this case could properly be determined by the jury to be constitutionally excessive under the Fourth Amendment.

As the five dissenting judges point out, the effect of the decision in this case "is that blood cannot be extracted from a drunk who refuses to have it done, and that is particularly so if the drunk is willing to become the least bit physical about it." (Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.)

It is vitally important for this Court to grant certiorari in this case. Law enforcement officers in California and other states are confronted on a daily basis with drunk drivers who refuse to

submit to a chemical test to determine their level of intoxication.

In California alone in 1990 there were 353,886 arrests for misdemeanor drunk driving, an additional 12,779 arrests for felony drunk driving (Cal. Depart. Justice, Bureau of Criminal Statistics, Crime and Delinquency in California, 1990, pp. 58, 145), and 22,915 revocations of drivers licenses under California's Implied Consent Law because the suspected drunk driver refused to submit to a chemical test at the time of arrest (California Department of Motor Vehicles, 1990, Suspension and Revocation Action Report).[5/]

This means that over 60 times a day, every day of the year, California law

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5. The Suspension and Revocation Report is an internal document produced by the California Department of Motor Vehicles, which handles drivers license suspensions and revocations in California under the Implied Consent Law.

enforcement officers alone are confronted with a recalcitrant drunk driver who refuses to submit to a chemical test. Law enforcement officers in other states are routinely faced with the same situation.

This Court has repeatedly emphasized the danger posed by drunk drivers and the compelling state interest in their effective prosecution. In upholding the constitutionality of highway sobriety checkpoints under the Fourth Amendment, Chief Justice Rehnquist recently emphasized the "magnitude of the drunken driving problem" and the states' interest in eradicating it.

> "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related deaths and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property

> damage.' [Citation] For decades, this Court has 'repeatedly lamented the tragedy.' South Dakota v. Neville, 45 US 553, 558, 74 L Ed 2d 748, 103 S Ct 916 (1983); see Breithaupt v. Abram, 352 US 432, 439, 1 L Ed 2d 448, 77 S Ct 408 (1957) ('The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield')." (Michigan State Police v. Sitz, supra, 496 U.S.___, 110 L.Ed 2d 412, 420-421, fn. omitted.)

(See also Illinois v. Batchelder, 463 U.S. 1112, 1118 (1983), and cases there cited.)

In Schmerber v. California, supra, 384 U.S. 757, this Court established the conditions under which a blood sample may lawfully be obtained under the Fourth Amendment from a suspected drunk driver who verbally refuses to consent to providing a blood sample for testing but who does not physically resist its taking.

In Schmerber, this Court concluded that the taking of a blood sample from a suspected drunk driver

constituted a search and seizure within the meaning of the Fourth Amendment (Schmerber, supra, 384 U.S. at p. 767), but that such a procedure was reasonable under the Fourth Amendment where there was probable cause for the drunk driver's arrest (Schmerber, supra, 384 U.S. at pp. 768-769), there was a "clear indication" the blood test would produce incriminating evidence of intoxication (Id., at pp. 769-770), and the blood sample was obtained "in a reasonable manner" and "according to accepted medical practices" (Id., at pp. 771-772).

The plurality in this case concludes Schmerber is distinguishable because in Schmerber "there was no suggestion of physical resistance by the suspect or use of force by the police." (Hammer v. Gross, supra, 932 F.2d at p. 845, plurality opinion); see also Id., at p. 845 ["As we have said, Schmerber

involved no physical resistance and no use of force."].) The plurality relies on this Court's statements in Schmerber that its judgment was based "'only on the facts of the present record,'" and that its holding in no way indicated that the Constitution "'permits more substantial intrusions or intrusions under other conditions.'" (Hammer v. Gross, supra, 932 F.2d at p. 845, plurality opinion, quoting from Schmerber, supra, 384 U.S. at p. 772.)

The plurality opinion in the instant case too narrowly construes Schmerber and misreads the import of this Court's caveat concerning "more substantial intrusions, or intrusions under other conditions." (Schmerber, supra, 384 U.S. at p. 772.)

While Schmerber involved a defendant who verbally refused to give his consent to taking a blood sample, but

offered no physical resistance, this Court in Schmerber rejected the distinction drawn by the plurality opinion in this case. The Court in Schmerber quoted with approval language from Chief Justice Warren's dissent in Breithaupt v. Abram, 352 U.S. 432 (1957):

> "We 'cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest.' Breithaupt v. Abram, 352 U.S., at 441 (Warren, C.J., dissenting. It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force." (Schmerber, supra, 384 U.S. at p. 760, fn. 4, emphasis added.)

In the instant case there was no evidence that the officer initiated the violence, or that he responded to Hammer's resistance with "inappropriate" force. Nor, as discussed in more detail, infra, was there a "reasonable request" by

respondent Hammer to undergo a different form of testing.

In concluding that the jury could properly determine that any use of force to obtain a blood sample was constitutionally excessive, the plurality adopts a five part test, derived from Graham v. Connor, supra, 490 U.S. 386: (1) whether the suspect "actively resist[s]" the extraction of his blood"; (2) the severity of the crime at issue; (3) whether the suspect posed an immediate threat to the safety of the officers or others; (4) whether the police refused to respect a reasonable request to undergo a different form of testing; and (5) the degree of the authorities' need for the blood sample. (Hammer v. Gross, supra, 932 F.2d 842, 846, plurality opinion.)

Notwithstanding that the jury was improperly instructed in this case under the subjective Johnson v. Glick, 481

F.2d 1028, 1033 (2d Cir. 1973) test, repudiated by this Court in Graham v. Connor, supra, the plurality concludes the jury could nevertheless have properly have found a Fourth Amendment violation because: (1) respondent Hammer's offense of drunk driving "was a misdemeanor" (Hammer v. Gross, supra, 932 F.2d at p. 846; plurality opinion); (2) Hammer, a drunk driver, posed "no threat to the safety of the officers or others" (Ibid.); and (3) Hammer, after twice refusing any form of chemical test, belatedly agreed at the hospital to submit to a breathalyzer test as force was already being applied to obtain a blood sample. (Ibid.)

The Ninth Circuit has misconstrued the significance and effect of Graham v. Connor.

Graham v. Connor mandated an objective rather than a subjective evaluation of the reasonableness of the

officer's actions. (Graham, supra, 490 U.S. at p. 397), and held that the jury had been improperly instructed under the subjective test formulated in Johnson v. Glick, supra, 481 F.2d 1028, 1033.

The plurality opinion fails to recognize that Schmerber itself applied an objective "reasonableness" analysis and concluded that the taking of a blood sample after a refusal of a chemical test by a drunk driving suspect was objectively reasonable under the Fourth Amendment where there was probable cause to arrest, a "clear indication" the blood test would yield incriminating evidence of intoxication, medically accepted procedures were employed and no more than appropriate force was used. Graham v. Connor does not change either this Court's analysis or conclusion in Schmerber, and the plurality in this case erred in reading Graham v. Connor otherwise.

The plurality seriously misapplies the Graham factors in the present context, given what this Court held in Schmerber. This Court made clear that the proper application of the reasonableness requirement of the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case . . ." (Graham v. Connor, supra, 490 U.S. at p. 396.)

With respect to the "severity of the offense," the plurality opinion in the instant case improperly denigrates the importance of the state interest, reasoning that Hammer was arrested only for "misdemeanor" drunk driving. (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

The plurality opinion supports this distinction by noting that in Schmerber "the offense was potentially a felony, because a person had been injured.

(Schmerber, 384 U.S. at 768-69 n. 12, 86 S.Ct. at 1834-1835 n. 12." (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

The plurality opinion ignores that Schmerber involved a misdemeanor conviction of driving under the influence, just as in the instant case. (Schmerber, supra, 384 U.S. at p. 758, fn. 1.) More importantly, the fact that Schmerber could have been charged with a felony played no part whatever in the reasoning of this Court in Schmerber. Instead, this Court's analysis was premised on the severe danger any drunk driver presents to the safety of the public.

The plurality's attempted distinction of Schmerber in this respect is based on a serious misperception concerning the true nature of the state's compelling interest with respect to prosecuting drunk drivers. The very

reason for obtaining a blood sample from a "misdemeanor" drunk driver is to remove him from the road before a felony occurs.

Moreover, the plurality's distinction would seriously undermine the utility of this Court's decision in Schmerber since the overwhelming majority of arrests in California are for misdemeanor drunk driving.[6/]

Similarly, the plurality opinion inexplicably misapprehends the question of whether Hammer posed "an immediate threat to the safety of the officers or others." The plurality opinion fails to explain why Hammer, a drunk driver, was not a danger to others on the road, and simply states: "Hammer certainly posed no threat to the safety of the officers or others."

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6. As previously noted by amicus curiae, there were 353,886 arrests for misdemeanor drunk driving in California in 1989, and 12,799 arrests for felony drunk driving.

(Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

The plurality opinion's analysis and cavalier treatment of "misdemeanor" drunk driving, coupled with its suggestion that Hammer posed "no threat to the safety of the officers or others", simply cannot be reconciled with this Court's repeated pronouncements concerning "the magnitude of the drunken driving problem or the States' interest in eradicating it." (Michigan State Police v. Sitz, supra, 496 U.S.___, 110 L.Ed 2d 412, 420-421, fn. omitted.)

Not only does the plurality opinion misconstrue the impact and effect of Graham v. Connor, and misapply its factors in the present context, but the effect of the plurality opinion's analysis would be to require jury trials "just about every time the police take blood," (Hammer v. Gross, supra, 932 F.2d at p.

853; Kozinski and Nelson, concurring) since under the plurality analysis the drunk driver starts out with two of the five factors in his favor since the great majority of drunk driving arrests are for "mere misdemeanors" and "none will involve the taking of blood to neutralize a threat to the officers." (Hammer v. Gross, supra, 932 F.2d at p. 853, [Kozinski and Nelson, concurring].)

However, the alternative analysis put forward in the concurring opinion to support the finding of a Fourth Amendment violation is equally faulty.

The concurring opinion of Judges Kozinski and Nelson finds a single factor constitutionally dispositive: Hammer's belated consent to a breathalyzer test. (Hammer v. Gross, supra, 932 F.2d at p. 851, [Kozinski and Nelson, concurring].)

Both the plurality opinion and the concurring opinion of Judges Kozinski

and Nelson conclude that there was no legitimate interest in compelling a blood test after Hammer belatedly agreed to an alternative form of testing. (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion; Id., at pp. 851-853, conc. opn.)

The plurality opinion refers to this Court's statement in Schmerber:

> "It is also appropriate to consider whether the police 'refused to respect a reasonable request to undergo a different form of testing.' Schmerber, 384 U.S. at 760 n. 4, 86 S.Ct. at 1830 n. 4." (Hammer v. Gross, supra, 932 F.2d at p. 846, plurality opinion.)

Both the plurality and concurring opinion are based on a fundamental misinterpretation of the footnote in Schmerber. There was no "reasonable request" by respondent Hammer in this case to undergo a different form of testing. California law provides for a single refusal of all three tests, and Hammer had

twice refused any and all chemical tests. Moreover, his change of heart about taking a breathalyzer test came during the application of force by the officer necessary to obtain a blood sample, and Hammer himself testified he twice refused any chemical test "because he thought 'there was a good possibility' that a chemical test would indicate that he was intoxicated." (Hammer v. Gross, supra, 932 F.2d at p. 844, plurality opinion.)

The officer here acted in a constitutionally reasonable manner in dealing with Hammer's "tergiversation about tests" (Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.)

California, like most states, gives a drunk driving suspect an initial choice of alternate chemical tests, i.e. blood, breath or urine, but further provides that if the drunk driver refuses all three of the choices, he impliedly

consents to the chemical test selected by the officer (Cal. Veh. Code, § 23157, subd. (a)(1)), and has no right to subsequently request an alternative chemical test.

As the dissenting judges correctly observe:

> "The California courts have also wisely indicated that [California Vehicle Code] section 13353 grants a person a single opportunity to submit to a blood alcohol test. Once a person refuses, the police are not obligated to give the person a second opportunity to comply with the statute. See Dunlap v. Department of Motor Vehicles, 156 Cal.App.3d 279, 283, 202 Cal.Rptr. 729 (1984) (police not required to give person second opportunity to take blood alcohol test after initial refusal); Morphew v. Department of Motor Vehicles, 137 Cal.App.3d 738, 743-744, 188 Cal.Rptr. 126 (1982) (person lawfully arrested for drunk driving may not avoid impact of section 13353 by frustrating officer's ability to administer blood alcohol test.) I say this is a wise approach because, whatever might seem ideal to those who have months to ruminate on the situation, it does not seem reasonable to

> require officers to deal with a driver's tergiversation about tests." (Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.)

Judge Kozinski suggests in his concurring opinion that California's "one bite" or single refusal rule is beside the constitutional point:

> "Rules of this sort have no bearing on our constitutional analysis; state law cannot render reasonable that which is not." (Hammer v. Gross, supra, 932 F.2d at p. 854, Kozinski and Nelson, concurring.)

The concurring opinion gives controlling significance to a belated and hence unreasonable consent to a different form of chemical test. This is not a case where state law renders "reasonable that which is not." (Hammer v. Gross, supra, 932 F.2d at p. 854, Kozinski and Nelson, concurring.) California's single refusal rule is entirely reasonable, as was the officer's reliance on it here. It was Hammer's game playing and "tergiversation

about tests" which was not. (Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.)

In concluding that there was no legitimate state interest in a blood test after Hammer belatedly agreed to a breathalyzer test, the plurality and concurring opinions also ignore the fact that a blood test does more than a breathalyzer test, since it tests for drugs as well as alcohol. (See Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 610 (1989) [Federal Railroad Administration placed primary reliance in their rules "on analysis of blood samples, as blood is 'the only available body fluid . . . that can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects.' 49 Fed. Reg. 24291 (1984)."].)

The California Implied Consent Law specifically provides, as it did at

the time of respondent Hammer's arrest, that a person lawfully arrested for driving under the influence is deemed to have given his consent not only to a "blood, breath or urine" test "for the purpose of determining the alcoholic content of his or her blood," but also to have given his consent to a "blood or urine" test "for the purpose of determining the drug content of his of her blood . . ." (Cal. Veh. Code, § 23157, subd. (a)(1).) Since Hammer twice refused all three of the tests, it was entirely reasonable for the officer to select the particular test which would be most informative for prosecutorial purposes under state law.

In addition, California law expressly defines the offense of driving under the influence of alcohol by the "percent, by weight, of alcohol <u>in a</u>

person's blood." (Cal. Veh. Code, §§ 23152, 23153, 23155; emphasis added.)

This Court specifically concluded in Schmerber that a blood test was a "reasonable" and "highly effective" means of determining the degree to which a person is under the influence of alcohol, and characterized it as a "commonplace" procedure which for most people "involves virtually no risk, trauma, or pain." (Schmerber, supra, 384 U.S. at p. 771.)

The officer's demand for a blood test after Hammer had twice refused any and all tests was constitutionally reasonable under the Fourth Amendment.

The effect of the majority's conclusion in this case is well described by the five dissenting judges:

> "While the majority avoids saying so, the effect of its decision is that blood cannot be extracted from a drunk who refuses to have it done, and that is particularly so if the drunk is willing to become the least bit physical about it."

(Hammer v. Gross, supra, 932 F.2d at p. 855, dis. opn.; emphasis added; fn. omitted.)

Both the plurality and the concurring opinions of the en banc Ninth Circuit in this case are in direct conflict with this Court's decision in Schmerber v. California, supra, 384 U.S. 757, as well as with California law since it follows Schmerber. The plurality decision misconstrues and misapplies this Court's decision in Graham v. Connor, supra, and ignores the controlling force of Schmerber. The effect of this decision will be to seriously impede the ability of law enforcement officers to enforce the drunk driving laws and to successfully prosecute drunk drivers by encouraging physical resistance and game playing by drunk driving suspects.

The instant case is doubly unfortunate, because not only does it uphold the jury verdict against the

municipality for the obtaining of a blood sample in full compliance with Schmerber, but there is not even a majority opinion to guide officers in the future in the performance of their duties in the enforcement of the California drunk driving laws. The Ninth Circuit has left officers and their employing agencies to guess in future cases as to their potential civil liability under 42 U.S.C. section 1983.

As Judge Kozinski points out in his concurrence, since there is no majority opinion, and the concurring opinion of Judges Kozinski and Nelson explicitly rejects the five factor test adopted by the plurality, the plurality opinion "does not become the law of the circuit." (Hammer v. Gross, supra, 932 F.2d at p. 854, Kozinski and Nelson, concurring.)

As a result, all law enforcement officers in California and throughout the Ninth Circuit now know, if this decision is permitted by this Court to stand, is that the municipality was held liable for a Fourth Amendment violation. Officers and their employing agencies cannot rely upon this Court's decision in Schmerber or previously settled California law which follows Schmerber, and must guess what their liability will be in the future under any given set of facts.

In the view of amicus curiae, this is a totally unacceptable state of the law, and seriously jeopardizes the effective enforcement of California's drunk driving laws, as well as those of every other state.

* * *

CONCLUSION

For the foregoing reasons, amicus curiae urges the Court to grant the City of Newport Beach's pending petition for a writ of certiorari.

Respectfully submitted,

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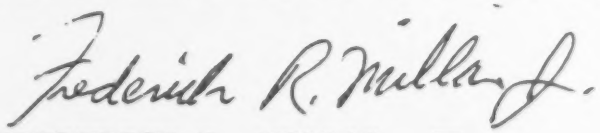

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CERTIFICATE OF SERVICE BY MAIL

No. 91-270

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CITY OF NEWPORT BEACH, a California City,

Petitioner,

v.

TIMOTHY HAMMER,

Respondent.

FREDERICK R. MILLAR, JR., a member of the Bar of the Supreme Court of the United States, declares:

That his business address is 110 West A Street, Suite 700, San Diego, California, 92101; telephone: (619)237-7766; that on September 23, 1991, he caused to be served the within BRIEF OF AMICUS CURIAE, STATE OF CALIFORNIA, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI in the above-entitled matter, as follows:

To William K. Suter, Clerk, Supreme Court of the United States,

Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and first class postage prepaid deposited in the United States mail at San Diego, California, on the 23th day of September, 1991.

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Supervising Deputy Attorney General

(3)

No. 91-270

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

CITY OF NEWPORT BEACH, a California City,
Petitioner,

v.

TIMOTHY HAMMER,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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November 1, 1991

QUESTION PRESENTED

Should this Court review an *en banc* court of appeals decision, upholding a $2,500 verdict against a municipality, that applies the long-standing test of reasonableness to determine whether the forcible seizure of blood from respondent, after he had consented to a breathalyzer test, violated the Fourth Amendment?

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In The

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TIMOTHY HAMMER,
Respondent.

On Petition for a Writ of Certiorari
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for the Ninth Circuit

BRIEF IN OPPOSITION

STATEMENT

In June 1985, respondent Timothy Hammer was arrested by police officer Armando Zatarain of petitioner City of Newport Beach for driving under the influence of alcohol. After applying handcuffs, Zatarain told Hammer that he would be required to take one of three chemical tests (blood, breath, or urine) to determine his blood alcohol level. Hammer refused to take any of the tests. App. A2-A3.[1]

Zatarain then transported Hammer to the emergency room at Newport Beach hospital to obtain a blood sample. Upon

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[1] Citations to "App. ___" are to the Appendix to the Petition.

arrival, Zatarain handcuffed Hammer by his right wrist to a hard plastic chair. Approximately five minutes later, the officer again asked respondent if he would submit to a blood test; Hammer again refused. Then, Zatarain told a laboratory technician to withdraw the sample over Hammer's objections. The officer grabbed Hammer's shoulders from behind and held him down while the technician began to swab his left forearm with iodine. Hammer moved when the technician attempted to insert the needle, at which point he and Zatarain, who continued trying to restrain Hammer as Hammer tried to evade the needle, both tumbled sideways onto the floor. Hammer, who was still handcuffed to the chair, twisted his back as he hit the floor. App. A3.

After picking Hammer up off the floor, Zatarain told Hammer that he was going to obtain the sample "the easy way or the hard way." Zatarain then called in two other officers to help him restrain Hammer, and threatened to throw Hammer to the floor and restrain him to obtain the sample. Hammer then stated that he would consent to a breath test "if that's what it's going to come to." Zatarain ignored him, held Hammer down in the chair, and the technician took the sample. App. A3-A4.

Hammer brought this action under 42 U.S.C. § 1983 against petitioner City of Newport Beach, police chief Charles Gross, and Officer Zatarain, alleging that the forcible extraction of blood from him, following his consent to an alternative form of testing, deprived him of rights secured by the Fourth and Fourteenth Amendments to the United States Constitution. App. B1-B2. The complaint sought compensatory damages from all defendants and punitive damages from the individual defendants. App. B4. Following a three-day jury trial and a denial of defendants' motion for a directed verdict, the jury rendered a verdict in favor of Hammer assessing a total of $13,000 of compensatory and punitive damages against the individual defendants and $2,500 in compensatory damages against the City. App. A2; App. A18; App. B2.

On appeal, a panel of the Ninth Circuit reversed, holding that the trial judge erred in denying the defendants' motions for directed verdict and judgment notwithstanding the verdict. *Hammer*

v. Gross, 884 F.2d 1200 (9th Cir. 1989), App. B. In evaluating Hammer's claim that the forcible seizure of his blood was a violation of the Fourth Amendment, the panel employed the "reasonableness" standard first enunciated in *Schmerber v. California*, 384 U.S. 757 (1966), and further explained in *Winston v Lee*, 470 U.S. 753 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989). In so doing, the panel found that the use of force in this case did not render the seizure "unreasonable" because the force used by Zatarain to obtain the sample "was nothing more than the application of physical restraint required to conduct the blood extraction in a safe and efficient manner." 884 F.2d at 1207, App. B18.

The panel declined to evaluate Hammer's claim that the seizure violated his Fourteenth Amendment right to due process in light of this Court's decision in *Graham* that all excessive force claims "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395. Accordingly, the panel's analysis concluded with its finding that the seizure was not "unreasonable" within the meaning of long-standing Fourth Amendment doctrine. 884 F.2d at 1208, app. B19.

The Ninth Circuit ordered rehearing *en banc*. In a six-to-five decision, the court reinstated the jury verdict against the City for compensatory damages. *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991) (*en banc*), App. A. In so doing, the court, like the panel, looked to *Schmerber* to determine whether a rational jury could have found that the seizure of Hammer's blood was "unreasonable" under the Fourth Amendment. As did the panel, it declined to apply a due process analysis to Hammer's claim in light of this Court's decision in *Graham*. 932 F.2d at 845-46, App. A6-A7.

In evaluating Hammer's Fourth Amendment claim, the court "assume[d] for purposes of decision that *Schmerber* does not preclude the use of force in some circumstances to extract blood from a resistant suspect." 932 F.2d at 845, App. A6. The court found, however, that a number of factors, including Zata-

rain's refusal to honor Hammer's consent to undergo a different form of testing, demonstrated that the jury's verdict had a rational basis. With respect to defendants' argument that Hammer's "belated consent" to the breathalyzer test was simply a ploy to create further delay, the plurality stated: "That is possible, but we cannot say that [Hammer's] bad faith was established as a matter of law." 932 F.2d at 846, App. A9. Having reinstated the jury's verdict against the City, the court then held that the individual defendants were entitled to qualified immunity as a matter of law. 932 F.2d at 850, App. A17-A18.

In a concurring opinion, Circuit Judges Kozinski and Nelson agreed with the majority that "[t]he standard, as always under the fourth amendment, is reasonableness," but emphasized that the defendants' failure to offer any explanation for Officer Zatarain's refusal to comply with Hammer's request to undergo a breathalyzer test was sufficient proof, in and of itself, of the unreasonableness of the seizure. 932 F.2d at 852, App. A23-A24. A five-judge dissent also "agree[d] [with the majority] that this case is controlled by *Schmerber* . . ." (932 F.2d at 854, App. A28), but concluded that "there was no evidence from which a reasonable jury could conclude that Officer Zatarain used excessive force." 932 F.2d at 855, App. A30.

REASONS FOR DENYING THE PETITION

Petitioner argues that the decision of the Ninth Circuit applying a reasonableness standard to evaluate the constitutionality of the seizure of Hammer's blood is an impermissable retroactive application of a new constitutional standard. As we explain below, however, the application of a reasonableness standard to evaluate the constitutionality of the forcible seizure of blood from a drunk driving suspect is well grounded in long-standing precedent of this Court and of the Ninth Circuit. In fact, the *en banc* majority's finding that the seizure of blood in this case could rationally be said to have violated the Fourth Amendment reasonableness standard is entirely consistent with this Court's decision in *Schmerber*. Because this case does not involve the application of a new constitutional standard, there is no retroactivity issue before this Court, and review should be denied.

I. The Ninth Circuit Did Not Depart From Established Precedent In Utilizing A Reasonableness Standard.

The three-judge panel and the entire *en banc* court agreed on the applicable rule of law: this case is properly analyzed under the reasonableness standard enunciated by this Court in *Schmerber*. There, this Court held that it was not unreasonable under the Fourth Amendment for police, upon probable cause but without a warrant, to take a blood sample from an arrested, hospitalized suspect who had declined to take a breathalyzer test. 384 U.S. at 771-72. Because the Ninth Circuit utilized the correct legal standard, there is no basis for this Court's review.

Moreover, since *Schmerber* was decided in 1966, this Court has made clear, time and time again, that challenges under the Fourth Amendment should be evaluated under a reasonableness standard. For example, in *Winston v. Lee*, 470 U.S. 753 (1985), *Schmerber* provided the analytic framework for holding that a proposed surgery into the chest muscle of an armed robbery suspect to search for a bullet was unreasonable under the Fourth Amendment. *Id.* at 766. This Court has also invoked *Schmerber* in contexts other than searches entailing an invasion of a suspect's bodily privacy and integrity. *See, e.g., Tennessee v. Garner*, 471 U.S. 1 (1984) (*Schmerber* reasonableness approach employed to hold that use of deadly force against unarmed and nondangerous fleeing felon is unreasonable seizure under Fourth Amendment).

The Ninth Circuit has regularly followed suit, applying a reasonableness standard to evaluate Fourth Amendment claims. *See, e.g., Thompson v City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989) (applying reasonableness standard to evaluate § 1983 claim that forcible extraction of blood violated the Fourth Amendment); *Smith v. City of Fontana*, 818 F.2d 1411, 1416 (9th Cir.) (applying reasonableness standard to evaluate § 1983 claim that force used during a personal seizure violated Fourth Amendment), *cert. denied*, 484 U.S. 935 (1987); *Berguist v. City of Cochise*, 806 F.2d 1364, 1369 (9th Cir. 1986) (applying reasonableness standard to determine, in § 1983 action, whether officers violated Fourth Amendment by destroying property of owners

whose residence was searched due to mistake in warrant); *Ward v. City of San Diego*, 791 F.2d 1329, 1332-33 (9th Cir. 1986) (applying reasonableness standard to § 1983 challenge to constitutionality of a strip search), *cert. denied*, 483 U.S. 1020 (1987); *United States v. Penn*, 647 F.2d 876, 882 (9th Cir.) (*en banc*) (stating that the reasonableness of a search authorized by a valid warrant may be vitiated "by the manner in which the police conducted the search, even if the conduct did not rise to the shocking level of a due process violation"), *cert. denied*, 449 U.S. 903 (1980).

In light of *Schmerber* and its progeny, the Ninth Circuit had no choice but to apply the *Schmerber* reasonableness test to petitioner's Fourth Amendment claim. Because the lower court followed established precedent in utilizing a reasonableness standard to evaluate Officer Zatarain's conduct, the retroactivity issue urged by petitioner is simply not presented in this case. *See James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2443 (1991) ("it is only when the law changes in some respect that an assertion of nonretroactivity may be made").

The Ninth Circuit's citation to this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), as support for its application of a reasonableness standard (*see* 932 F.2d at 845, App. A6) does not indicate otherwise. In *Graham*, which was announced while respondent's case was on appeal to the Ninth Circuit, this Court held that "*all* claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395 (emphasis in original). Contrary to petitioner's claim, *Graham* did not substitute a new standard for evaluating excessive force claims under the Fourth Amendment. As stated above, this Court has *always* utilized a reasonableness analysis in evaluating Fourth Amendment claims. Rather, the effect of *Graham* was to ensure that even those excessive force claims that allege violations of the Fourteenth Amendment or of "some generic 'right' to be free of excessive force" (490 U.S. at 393) are analyzed under the Fourth Amendment reasonableness standard

rather than under the substantive due process approach traditionally applied in the Fourteenth Amendment context. *See* 490 U.S. at 394-95.

Thus, the only effect that *Graham* had on the decision in this case, in which Hammer alleged violations under both the Fourth and Fourteenth Amendments, was to *narrow* the scope of the Ninth's Circuit's analysis to consider only whether the search was "reasonable" within the meaning of the Fourth Amendment. Prior to *Graham*, the Ninth Circuit would likely have conducted separate analyses of Hammer's Fourth and Fourteenth Amendment claims, applying a reasonableness standard to the former and a due process "shock the conscience" analysis to the latter. *See Penn*, 647 F.2d at 880-83; *cf. Schmerber*, 384 U.S. at 759-60, 766-72 (applying due process analysis to claim that seizure violated Fourteenth Amendment and reasonableness analysis to claim that seizure violated Fourth Amendment). *Graham* made clear, however, that only one standard -- that of reasonableness -- need be applied to Fourth and Fourteenth Amendment excessive force claims. Accordingly, and quite correctly, the Ninth Circuit narrowed its review to focus exclusively on the reasonableness of the seizure. Thus, there is no basis for petitioner's claim that, "[i]f *Graham* applies in the *Schmerber* context, it has overruled clear past precedent, changing the 'shock the conscience' due process test to one of objective reasonableness under the Fourth Amendment." Petition at 16.[2]

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[2] We note that the *en banc* majority injected an element of confusion into this case by suggesting, in the context of its discussion of qualified immunity for the individual defendants, that *Graham* did effect a change in the applicable standard and that "[r]easonable officers . . . cannot be required to have anticipated the ruling in *Graham*." 932 F.2d at 850, App. A18. Because *Graham* did not effect a change in the applicable standard, that cannot be a proper basis for the court's finding that the individual defendants are entitled to qualified immunity. That finding, which was against respondent and in favor of petitioner's employees, is not before the Court and accordingly is not a basis for granting review. In any event, a finding that the individual defendants were entitled to qualified immunity does not shield the petitioner from liability. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

II. The Question Of Whether The *En Banc* Court Correctly Applied The Reasonableness Standard To The Unique Facts Of This Case Does Not Warrant Review.

Petitioner's second claim is that review should be granted because the lower court "effectively overruled" *Schmerber* by upholding the jury's finding of unreasonableness here and upholding its $2,500 verdict against the City. Petition at 10. In so arguing, petitioner asks this Court to second-guess the conclusion of a six-to-five *en banc* court that, under the unique facts of this case, the jury rationally determined that the search at issue was unreasonable under the Fourth Amendment. It is clear, however, that even if this Court disagrees with the Ninth Circuit's fact-specific application of *Schmerber*, its ruling on this point, which did not create a split in the circuits, does not raise an issue of sufficient importance to warrant review.

Moreover, the Ninth Circuit's decision is entirely consistent with *Schmerber*, where this Court emphasized that "[Mr. Schmerber] is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'breathalyzer' test petitioner refused." 384 U.S. at 771. In this case, unlike in *Schmerber*, Hammer *did* ultimately state a preference for some other means of testing -- the breathalyzer test -- but this request was ignored. As Circuit Judge Kozinski noted, "[t]he bottom line is that Officer Zatarain acted properly in every respect but one: He failed to give Hammer an alternative test when Hammer consented to it and when (it appears from the record) the alternative was readily available." 932 F.2d at 853. This fact alone readily distinguishes this case from *Schmerber*, and demonstrates the fallacy in petitioner's claim that the lower court "effectively overruled" that decision.

Nor is there any merit to petitioner's suggestion that "Hammer's eleventh-hour concession to take a breathalyzer test is not the 'reasonable request to undergo a different form of testing' which this Court in *Schmerber* said might present a 'different case.'" Petition at 11 (citing *Schmerber*, 384 U.S. at 760 n.4). This argument has no grounding in the federal Constitution.

Rather, the sole basis for this assertion appears to be a California statute which penalizes a driver's refusal to consent to a blood, breath, or urine test with a six-month suspension of his or her driver's license. *See* Calif. Vehicle Code § 13353, App. C. Petitioner's reliance on this statute is misplaced, since it clearly does not authorize the use of force to extract blood following a refusal to consent. Even if it did, "rule[s] of this sort have no bearing on our constitutional analysis; state law cannot render reasonable that which is not." 932 F.2d at 854. Accordingly, there is no basis for petitioner's suggestion that the Ninth Circuit effectively overruled *Schmerber*, and no reason for this Court to grant review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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